UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANORCARE OF ALLENTOWN, PA LLC, d/b/a
MANORCARE HEALTH SERVICES – ALLENTOWN,
Employer,

and **CASE 06-RC-186558**

RETAIL, WHOLESALE, & DEPARTMENT STORE UNION,
UNITED FOOD and COMMERCIAL WORKERS UNION, AFL-CIO.

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW

Submitted by:

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March 6, 2017

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EMPLOYER'S REQUEST FOR REVIEW

COMES NOW, ManorCare of Allentown, PA LLC ("Employer"), and files this Request for Review of Pre- and Post-Election Issues underlying the Regional Director's Decision and Certification of Representative, issued on February 10, 2017, in the above-captioned case. This Request is based on the following pre-election and post-election errors in the case processing:

A. The Regional Director of Region 6 violated the applicable Board regulation, 29 C.F.R. §102.60, in processing the petition in this case that was filed with the incorrect Region.

B. The Regional Director of Region 6 violated Board decisional law by processing the petition in this case filed on October 20, 2016, while a petition was still pending in Case No. 04-RC-159640 and the Petitioner was still certified for the same bargaining unit as the result of the November 3, 2016 certification in Case No. 04-RC-159640, which was less than one year before this case was filed. The petition in this case was barred by the rules of *United Supermarkets*, 287 NLRB 119 (1987), *enf'd*, 862 F.2d 549 (5th Cir. 1989) and *Centro-O-Cast Engineering Co.*, 100 NLRB 1507 (1951).

C. The General Counsel erred by taking ultra vires action *sua sponte* in ordering Region 6 *falsely* to consider the petition to have been filed in Region 4 and then transferred to Region 6 to attempt to correct the Regional Director's violation of 29 C.F.R. §102.60. The General Counsel's action violated the applicable Board regulations, 29 C.F.R. §§102.60 & 102.72.

D. The Regional Director of Region 6 erred in not recusing herself and Region 6 from the case and not ordering a transfer of the case to another Region other than Regions 4 where the conduct of the Regional Directors was not in issue.

E. The processing of the petition in this case and application of the "new" election regulations violated due process.

F. The Regional Director of Region 6 erred in ordering the posting of a notice of election that did not include appropriate *Lufkin* language and that described the election as "essentially" a re-run election of the election in Case No. 04-RC-159640, where was no re-run election and the taint of the objectionable conduct at issue in the first case was not remedied and was magnified in the second case.

G. The Board's "new" regulations for representation cases under which this proceeding took place are invalid facially and as applied, as they violate the National Labor Relations Act, the Administrative Procedure Act, and the U.S. Constitution's guarantee of due process.

H. The Board left un-remedied the tainted election conditions by failing to remedy the Petitioner's Objectionable distribution of a facsimile sample ballot that would have misled eligible voters into believing that the Board favored a "yes" vote and was not neutral in the election, Case No. 04-RC-159640. That failure tainted the showing of interest in the subsequent petition (Case No. 06-RC-186558) which was filed before the prior petition had even been withdrawn.

I. Region 6 demonstrated bias in failing to remedy the Objections of the Employer to the bias of Region 4 in Case No. 04-RC-159640 and directing "essentially a re-run election" without curing the objectionable taint created by the misconduct of the Regional Director of Region 4 and public notice of it.

J. Region 6 erred in failing to order a re-run election and certifying the results of the election in this case by overruling the Employer's Objection to the Petitioner's threat to inform the Employer of employees who had signed authorization cards for the Petitioner that was heard by eligible voters before and during the representation case hearing.

I. BASIS FOR REVIEW

The Regional Director's Decision and Certification of Representative, issued on February 10, 2017, should be reviewed for the following reasons:

1. The processing of the case by Region 6 violated Board regulations and thus raises substantial questions of law and policy because of the absence of and departure from officially reported Board regulations and Board precedent;

2. The case handling by Region 6 was conducted pursuant to "new" representation case regulations that are invalid facially and as applied here and thus raises substantial questions of law and policy;

3. Region 6 erroneously (a) issued a notice of "essentially" a re-run election, (b) precluded a hearing on certain issues and Objections, and (c) overruled meritorious Objections, thus raising substantial questions of law and policy because of the absence of and departure from officially reported Board regulations and Board precedent, as well as due process.

II. OBJECTIONS RELEVANT TO REQUEST FOR REVIEW[1]

Objection No. 1

During the critical period before the Board election in October 2015 in Case 04-RC-159640, agents, employees and representatives of the Petitioner restrained and coerced employees and interfered with employee free choice in a manner which destroyed the laboratory conditions necessary for a fair and free election. This result was caused by the distribution of copies of a "Sample Ballot" marked with a "YES" box checked and **not** including the disclaimer language required by the Board on its "Sample Ballots" since its decision in *Ryder Memorial Hospital*, 351 NLRB 214 (2007). The Board thereafter permitted the current case to commence and at all times failed to cure the remaining taint created by Petitioner's improper use of the Sample Ballot in the first campaign. The impact of the Sample Ballot was also not addressed by the Notice of Election in the instant case which failed to incorporate the necessary *Lufkin* language. The *Lufkin* language needed to be provided to inform the employees that the election was being re-run because in the first election critical period the Petitioner had engaged in conduct that would reasonably have led employees to believe that the Board favored a "yes" vote and was not a neutral government agency. Because such *Lufkin* language was not included in the Notice of Election in the current case, but

[1] A copy of the Employer's Objections filed in this case is attached as part of this request as Exhibit 1. Other exhibits are similarly attached and marked by number 2 through 5.

which expressly stated that the upcoming election was "essentially a re-run election," the suggestion of bias created by the Sample Ballot was present during the critical period following the filing and processing of the instant Petition.

Objection No. 2

The Petition in this case was filed by Petitioner and accepted by Region 6 while another Petition and case involving this same Employer and bargaining unit was still pending (Case 04-RC-159640). The filing in Region 6 instead of Region 4 also violated Board regulations. Moreover, the Board violated Board decisional law (namely, "pending certification and petition bars" to a new petition for the same unit) and created potential confusion in the minds of employees by accepting the Petition and processing it while the other case was still pending with unresolved objections. In fact, the certification of Petitioner as representative of the bargaining unit had already been issued and was pending at the time the instant Petition was filed.

Objection No. 3

The actions of Region 6 and Board General Counsel, ex post facto, to accept the invalid Petition (filed and accepted in violation of Board regulations), and to treat the Petition retroactively as having been originally filed in Region 4 and transferred to Region 6, when that was contrary to fact, violated the Board's regulations and thus the Act. Moreover, the Board's failure to require compliance with and follow its own regulations for the processing of representation cases, at a minimum, raised questions concerning the Region's and Board's neutrality in this case, if it does not in fact demonstrate bias in favor of the Petitioner and against the Employer. These actions created an environment in which a fair and free election was impossible.

Objection No. 4

The Regional Director's refusal to recuse herself and Region 6 from the processing of this case by refusing to transfer the case out of Region 6 created an appearance of bias that destroyed the laboratory conditions surrounding the election which were necessary for a fair and free vote.

Objection No. 5

Due to the overlap in cases and improprieties in the processing of the instant Petition in violation of Board regulations, the Board bias against the Employer (bias of Region 4) raised in the predecessor Petition that was never addressed, together with new evidence in this case of bias and actions by Region 6 and the Board in favor of the Petitioner and in violation of Board regulations, have served to destroy the laboratory conditions for the election in this case. The Objections raising bias issues in the predecessor case were as follows:

> a. **Supplemental Objection 1:** The Regional Director's activities on behalf of the Peggy Browning Fund, including soliciting donations from unions and union-side law firms, as well as serving as the Fund's Chairman until August 19, 2015, violated the Standards of Ethical Conduct for Employees of the

Executive Branch, as outlined in *Inspector General Report OIG-I-516* (November 9, 2015); this conduct further created an appearance of impropriety and bias, and fundamentally undermined the neutrality of the Region in handling this case.

b. Supplemental Objection 2: The conflict of interest created by the Regional Director's solicitation of donations on behalf of the Peggy Browning Fund from "prohibited sources," as defined in *Inspector General Report OIG-I-516* (November 9, 2015), including the law firm representing the Petitioner in this case, was not disclosed; created an appearance of impropriety and bias; and resulted in the denial of due process to the Employer.

Objection No. 6

The Notice of Election in this case erroneously referred to the election as "essentially [being] a re-run of the election conducted on October 1, 2015 in Case No. 04-RC-159640." The remaining language of the Notice of Election did not fulfill the required *Lufkin* requirements and misrepresented the nature and content of the Employer's election objections in the prior case. A full and proper *Lufkin* notice would have been required in a "true" re-run election. However, the NLRA and Board regulations do not authorize anything akin to "essentially a re-run election." An election in these circumstances, had to be either be a new "election" or a "re-run election." By creating a new type of "hybrid" election without a *Lufkin* notice – "essentially a re-run election" – the Regional Director improperly permitted the taint of prior objectionable conduct to remain without curing the taint as would have been required under a "true" re-run election conducted under Board law and regulations. Consequently, the legal deficiencies in the Notice of Election created the likelihood of reasonable confusion in the minds of voters in this election.

* * *

Objection No. 9

The Petitioner, through statements of its agents, threatened eligible voters and made employees reasonably fearful of implicit retaliation by offering to turn over authorization cards that they had signed to the Employer if the Petitioner did not win the election.

III. RELEVANT PROCEDURAL HISTORY AND FACTS

A. Case No. 04-RC-159640

On September 9, 2015, the Petitioner filed a petition with Region 4 for an election in a bargaining unit of employees at a nursing home in Allentown, Pennsylvania in Case No. 04-RC-159640. Under Board regulations, 29 C.F. R. §102.60, Region 4 was the only correct Region for filing a petition for a bargaining unit located wholly in Allentown. *See* 29 C.F.R. § 102.60; NLRB

Case Handling Manual, Part II, Sec. 11002.3 & 15010.

During the critical period before the Board election scheduled for October 1, 2015, agents, employees and representatives of the Petitioner distributed of copies of a "Sample Ballot" marked with a "YES" box checked and **not** including the disclaimer language required by the Board on its "Sample Ballots" since its decision in *Ryder Memorial Hospital*, 351 NLRB 214 (2007). *See* Exhibit 2.

During the critical period the Petitioner also distributed a copy of a September 22, 2015 letter to the Employer's on-site Administrator, Kate Huck, threatening to file unfair labor practice charges if the Employer questioned any employees regarding whether or not they signed authorization cards. *See* Exhibit 3.

On October 1, 2015, Region 4 conducted an election in that case. The Petitioner had a majority vote in that election.

On October 7, 2015 the Employer filed Objections. One Objection alleged that agents, employees and representatives of the Petitioner restrained and coerced employees and interfered with employee free choice in a manner which destroyed the laboratory conditions necessary for a fair and free election by distributing copies of a "Sample Ballot" marked with a "YES" box checked and **not** including the disclaimer language required by the Board on its "Sample Ballots" since its decision in *Ryder Memorial Hospital*, 351 NLRB 214 (2007).

On November 3, 2015, the Regional Director for Region 4, Dennis Walsh, rejected the all the Objections in that case without a hearing and certified the Petitioner as the representative of the unit.

On November 17, 2015, the Employer requested review from the Board of the Region 4 decision.

While the Request for Review was pending, the Employer learned of misconduct by Regional Director Walsh that demonstrated pro-organized labor activities and his bias on behalf of the labor unions. Based on the evidence of misconduct that the Employer learned of and public press commentary about the misconduct that could have given eligible voters the impression that the Regional Director was not neutral, on April 7, 2016, the Employer filed a motion with the Board to reopen the hearing, and requested the right to file supplemental objections to the election and case processing due to the issue of bias of the Regional Director 4, Mr. Walsh and publication of the bias.

On April 20, 2016, the Board granted the motion to re-open the hearing and the Request for Review, set aside the Regional Director's decision on the objections, and remanded the case for a hearing including supplemental objections.

Because the conduct of Mr. Walsh and his bias in favor of organized labor and against employers was directly in issue, the Employer moved to recuse Mr. Walsh and to transfer that case, Case No. 04-RC-159640, to some other Region of the Board.

On April 22, 2016, the Board ordered that case transferred from Region 4 to Region 6 and for a hearing on the objections to occur *de novo*.[2] Region 6 then accepted Supplemental Objections based on the bias of Mr. Walsh and the appearance of impartiality of the Board. The objections were:

> **Supplemental Objection 1:** The Regional Director's activities on behalf of the Peggy Browning Fund, including soliciting donations from unions and union-side law firms, as well as serving as the Fund's Chairman until August 19, 2015, violated the Standards of

[2] Consistent with the Employer's motion to transfer Case No. No. 04-RC-159640 to another Region, the order transferred only that case to Region 6. The order did not require or authorize any other cases to be transferred to Region 6 or any other Region. Such an order would have been inappropriate, as it would have deprived future, would-be Intervenors in other cases of any public notice from the Board of representation proceedings in Region 4's geographic area.

> Ethical Conduct for Employees of the Executive Branch, as outlined in *Inspector General Report OIG-I-516* (November 9, 2015); this conduct further created an appearance of impropriety and bias, and fundamentally undermined the neutrality of the Region in handling this case.
>
> **Supplemental Objection 2:** The conflict of interest created by the Regional Director's solicitation of donations on behalf of the Peggy Browning Fund from "prohibited sources," as defined in *Inspector General Report OIG-I-516* (November 9, 2015), including the law firm representing the Petitioner in this case, was not disclosed; created an appearance of impropriety and bias; and resulted in the denial of due process to the Employer.

On May 25, 2016, a hearing *de novo* began before a Hearing Officer of Region 6 on all the Objections, including the Supplemental Objections, as the Board had ordered. During the hearing, the Hearing Officer ordered a bifurcation of the hearing issues, reserving presentation and consideration of all evidence regarding the supplemental objections relating to the bias of the Regional Director for Region 4 until a later undetermined hearing date (a Phase II hearing). The hearing remained "open."

On June 6, 2016, the General Counsel ordered Region 6 to take an Offer of Proof on the Supplemental Objections related to Regional Director Walsh, and rejected the Employer's request to subpoena him for the Phase II hearing.

On September 6, 2016, the Employer submitted an Offer of Proof to the Hearing Officer on the issue of the bias of Regional Director Walsh. The Offer of Proof included a report of the Board's Inspector General regarding misconduct of Regional Director Walsh that demonstrated either actual bias or the appearance of bias in favor of labor organizations and against employers. *See* Exhibit 4.

In response to the Offer of Proof, Region 6 then attempted to avoid continuation of the still-open hearing on the bias issues raised in the Supplemental Objection and the Offer of Proof by

attempting to get the parties to stipulate to a re-run election. The parties reached no stipulation for a re-run election and the hearing on Objections that the Board had ordered on remand was to continue.

At that point, instead of re-commencing that hearing on the Objections, including the Supplemental Objections, the Petitioner, with the assistance of the Regional Director for Region 6, Nancy Wilson, commenced this case as a new case, untethered to the Board's unambiguous and clear regulations and guiding precedent, in a fashion that carried the taint at issue in Case No. 04-RC-159640 forward unremedied. In short, through *ex parte* communications, they bridged from Case No. 04-RC-159640 to a new case commenced in violation of Board regulations and guiding precedent to bypass the hearing on Objections on remand, and by so doing left the "tainting" conduct at issue unremedied.

B. The New Representation Case in the Wrong Region Processed by Region 6 in Violation of Board Regulations

On October 20, 2016, while the Region 4 case was still pending and while the Petitioner was still certified as the representative of the bargaining unit based on the November 3, 2015 certification of representative – a certification that still had binding *status quo* effect putting at risk any unilateral changes that the Employer might have made and that restricted the Employer's unilateral actions based on an *Alan Ritchey* theory[3] -- the Petitioner commenced this case by filing a new petition with Region 6 for the same unit of employees in Allentown, Pennsylvania, even though the bargaining unit was in Region 4's geographic territory. This was a blatant "forum shopping" in choice of Regions by the Petitioner contrary to Board regulation 29 C.F.R. § 102.60. But instead of rejecting the petition in accordance with 29 C.F.R. §102.60 and/or finding the petition barred because of the still-pending "other petition" in Case No. 04-RC-159640 or the one-

[3] *See Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (Aug. 26, 2016).

year certification bar rule, Region 6 accepted the "overlapping" petition. Region 6 immediately began processing that new petition and scheduled a hearing for October 28, 2016. In doing so, potential Intervenors (labor organizations) monitoring petition filings in Region 4, the correct geographic Region, were deprived of any public notice of the case filing for an election in Region 4. And all Intervenors on that date were still barred by the pending case and certification year bar of Case No. 04-RC-159640.

C. Belated Withdrawal of the First Case and Improper New Case Processing

A day later, on October 21, 2016, Region 6 issued an Order allowing withdrawal of pending Case 04-RC-159640. Region 6 also cancelled the continuation of the scheduled hearing on the Objections in that case; the issues in the Objections, including the Supplemental Objections, thus were left unaddressed, undecided, and unremedied. However, Region 6 failed at that time to revoke or rescind the November 3, 2015 Certification of the Petitioner in Case No. 04-RC-159640. The Certification (1) put the Employer at potential risk of unfair labor practices for unilateral changes made while the Certification was in place and (2) still barred any and all would be Intervenors. The one-year "certification bar" was not to end until November 3, 2016.

On October 27, 2016, the Employer moved to transfer the case out of Region 6 to some other Region based on the fact that Region 6 had accepted the new petition in violation of Board regulation 29 C.F.R. §102.60 while the Region 4 certification of the Petitioner was still in place and while the Region 4 case, Case No. 04-RC-159640, was still pending. In short, Region 6 had improperly and prejudicially allowed the Petitioner to "forum shop" and thus avoid dealing with the issues in Case No. 04-RC-159640. The conduct of Region 6 and its Regional Director in assisting the Petitioner to violate Board regulations, as Region 6 was applying them, was now at issue in this case.

That same day, October 27, 2016, the Employer filed a Statement of Position in this case

objecting to, inter alia, Region 6's action in: (1) accepting the new petition for a unit while another R case was pending and while the Petitioner was certified in Case 04-RC-159640 during the prior one year period; (2) accepting the new petition in this case that was filed in the wrong Region; and (3) applying regulations that were invalid. *See* Exhibit 5 (Attachment A to Statement of Position form).

D. The General Counsel's Ultra Vires Action to Approve Retroactively the Violation of Board Regulations

Then later that same day, in response to the Employer's Statement of Position raising, *inter alia*, the violations of Board regulations, the General Counsel, in an extraordinary measure, with no motion or hearing, *sua sponte* ordered the case be treated, with retroactive effect, as though it had been filed in Region 4 originally and then transferred to Region 6. General Counsel Griffin did that even though the order was contrary to fact and even though (1) no regulations give such power to the General Counsel and (2) the Employer raised the violation of 29 C.F.R. §102.60 in its Statement of Position and was afforded no hearing on the issue. Based on this order, Region 6 denied the Employer's motion to transfer the case away from Region 6 and proceeded to a pre-election representation hearing.

E. The Region 6 Hearing and Order of "Essentially" a Rerun Election

On October 28, 2016, a Hearing Officer of Region 6 proceeded with a representation hearing in this case. In the hearing, the Hearing Officer informed the parties that she would not take evidence or decide any issues involving errors in processing the petition, as she had already been directed by the Regional Director not to hear those issues. *See* October 28, 2016 Hearing Transcript ("Hearing I Tr.") at 30-33, 69 (hereinafter referred to as Hearing I). The applicable Board regulations forced the Employer's counsel to accept that ruling without waiving the pre-

election issues raised in its Statement of Position.[4]

That same day as the hearing, October 28, 2016, Region 6 issued an Amended Order in Case 04-RC-159640 that for the first time revoked the Certification of Petitioner that had been in place since November 3, 2015 and that had (1) put the Employer at potential risk for unfair labor practices for unilateral changes while the Certification was in place and (2) barred all other petitions and Intervenors.

On November 11, 2016, Region 6 issued a Decision and Direction of Election ordering an election be held on November 29, 2016. The Notice of Election referred to the election as "essentially" a "re-run election" of the election in the prior Region 4 case, but the language of the notice did not meet the requirements of a *Lufkin* notice that would have been used in a true re-run election had the Employer prevailed on its Objections, including Supplemental Objections, that were left unresolved in the Region 4 case.

On November 29, 2016, an election was held. The tally of ballots reflected that, of 64 eligible voters, 39 votes were cast for the Petitioner, 16 votes were cast against the Petitioner, and no ballots were challenged.

Pursuant to the Board's Rules and Regulations, the Employer filed Objections. Objection 9 provided:

> The Petitioner, through statements of its agents, threatened eligible voters and made employees reasonably fearful of implicit retaliation by offering to turn over authorization cards that they had signed to the Employer if the Petitioner did not win the election.

On December 14, 2016, the Regional Director ordered a hearing only on Objection 9.[5]

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[4] The Employer asserts that the application of the "new" representation case regulations here to deprive the Employer of making a record on the case processing issues, including the bias and prejudice demonstrated by the processing actions, violated due process.

[5] The Employer asserts that the application of the "new" representation case regulations here, again

After a hearing on Objection 9, a Hearing Officer overruled it, finding that there was no evidence that any implicitly threatening conduct of the Petitioner's agents that the Employer objected to was disseminated beyond the employees in the hearing room. The Employer filed Exceptions to the Hearing Officer's Report.

On February 10, 2017, Regional Director Nancy Wilson issued a Decision and Certification of Representative in which she decided that all the Employer's Objections, including Objection 9, should be overruled.

For the reasons discussed below, the Employer requests review of the issues of error listed above.

III. ARGUMENT

For over 80 years, the National Labor Relations Board has been entrusted with the tremendous responsibility of ensuring fairness in representation elections. While this responsibility begins with the Board, it extends to every member of the agency; as such, each NLRB employee is charged with protecting the integrity and neutrality of the Act, and ensuring that the carefully formulated safeguards of the election process are maintained. *Alco Iron & Metal Co.*, 269 NLRB 590, 591 (1984) (noting that "[t]here is well established precedent that the Board in conducting elections must maintain and protect the integrity and neutrality of its procedures").

This case serves as an unfortunate example of what happens when those safeguards are not followed, and when the integrity of the proceedings – and the NLRB's fiercely guarded neutrality – are called into question.

Given this blunt reality, the Employer submits that if the February 10, 2017 Decision and

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at the Objections stage, to deprive the Employer of making a record on the case processing issues, including the bias and prejudice demonstrated by the processing actions, violated due process.

Certification are affirmed by the Board, this case will serve to undermine fundamentally a guiding mandate of the agency, and it will stand in stark contrast to the NLRB's entire history of promoting fairness in representation elections. It will harm the reputation of the agency, and it will set a dangerous precedent in direct contradiction of unambiguous federal regulations and clear Board law should have barred processing of the instant petition. Accordingly, for these reasons, the Employer respectfully requests that the Board vacate the Decision and that it recognize the facts here for what they are.

REQUEST FOR REVIEW – PRE-ELECTION MATTERS

A. Region 6 Violated Board Regulations by Processing the Petition

Petitioner erroneously filed the petition with Region 6 in violation of Board regulation 29 C.F.R. § 102.60. No regulation permitted Region 6 to process the petition, which needed to be filed, if at all, in Region 4. Region 6 thus erred in processing the petition.

The site of the unit of employees in question is Allentown, Lehigh County, Pennsylvania, which is in Region 4. Thus, Region 4 was the only correct Region for filing a petition for the unit. *See* NLRB Rules and Regulations, Sec. 102.60; NLRB Case Handling Manual, Part II, Sec. 11002.3 & 15010. Had the Petitioner filed it with Region 4 in accordance with the Board's regulations, the Board could then have considered transfer under its transfer procedures, but that did not happen. *See* NLRB Rules and Regulations, Sec. 102.60 & 102.72; NLRB Case Handling Manual, Part II, Sec. 11712 & 11714. By permitting the Petitioner to forum shop, Region 6 erred by allowing to the Petitioner a choice in the selection of a Region that was unavailable to the Employer or any would be Intervenors. Thus, Region 6 was biased in Petitioner's favor at the outset.[6]

[6] Region 6's action not only prejudiced the Employer. It should be noted again that would-be Intervenors, through the action of Region 6, were deprived of the public notice from Region 4 of

On this error alone, the Region 6 Decision should be vacated and the petition should be dismissed without any prejudice to the Petitioner filing a petition in the correct Region, Region 4. The Petitioner or Employer could then move for transfer to another Region, even Region 6, if either wanted to so move and the request would be considered on the merits, consistent with Board regulations and fundamental fairness.

B. Region 6 Erred in Processing the Petition When It Was Barred by the Petition and Certification in Case No. No. 04-RC-159640

The petition in this case, when filed on October 20, 2016 was barred by the then-pending petition in Case No. 04-RC-159640. The petition in Case No. 04-RC-159640 was active and pending until withdrawal was effective when approved by Region 6 in its Order executed on October 21, 2016.[7] The petition was also bared by the one-year certification bar. The November 3, 2015 Certification in Case No. 04-RC-159640 was still in place until October 28, 2016. The petition in this case was barred by the rules of *United Supermarkets*, 287 NLRB 119 (1987) *enf'd*, 862 F.2d 549 (5th Cir. 1989) (one year certification bar strictly applied) and *Centro-O-Cast Engineering Co.*, 100 NLRB 1507 (1951) (applying one year certification bar).

It must be emphasized that Petitioner had no special right to file the petition prematurely, before an effective order of allowing withdrawal of the pending petition in Case No. 04-RC-159640 or while a certification was still in place during the one-year certification bar. If Petitioner had such a special right, it would have prejudiced "would be" Intervenors who were barred

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the filing of a petition for an election unit in Region 4's geographic Region. Their monitoring Region 4 notices would have told them nothing about the new petition. Any would-be Intervenors thus had no reasonable notice and opportunity to intervene.

[7] No order approving the withdrawal was made until October 21, 2016. Any tentative approval requested of or given by Region 6 before that date was ineffective to permit and effect withdrawal. The Board's own record of the docket in that case demonstrates that the petition was not effectively withdrawn by order until October 21, 2016, one day after the petition in this case was filed prematurely and in the wrong Region.

themselves.

The irrefutable fact is that Region 6 ignored regular rules for processing the petition in this case and gave the Petitioner special, favorable treatment that is not authorized by Board regulation or decision. The action of Region 6 to allow the barred petition demonstrates improper case processing by the Region 6 and the violation of due process in applying some regulations and ignoring others, and cannot simply be overlooked.[8] The fact that the petition in this case was received and processed only a day before the petition in Case No. 04-RC-159640 was withdrawn and eight days before the certification in that case was revoked is not a *de minimis* circumstance. Untimely is untimely – the petition was barred. On this error alone, the Region 6 Decision should be vacated and the petition should be dismissed.

C. The General Counsel Erroneously and Prejudicially Directed Region 6 to Ignore Board the Petitioner's Violation of Board Regulations And Process the Petition as If It Had Been Filed in Region 4 and then Transferred to Region 6 When It Was Not So Filed and Transferred

Under the Board's regulations, the Employer was required to file a Statement of Position raising all issues related to the representation proceeding – at the risk of waiving any issues not raised therein. Here, the Employer in its Statement of Position objected to the processing of the petition because Petitioner filed it in violation of the Board's regulations, having filed the new petition in Region 6, not the correct Region, Region 4.

In a nearly immediate response to the Employer's assertion in its Statement of Position that the petition was filed in the wrong Region and thus violated Board regulations, the General Counsel, with no motion from any party or any hearing on the issue, sprang into action *sua sponte* and

[8] The Hearing Officer refused to allow the Employer to make a record on the issues of the petition processing by Region 6 that violated Board regulations, citing her pre-hearing discussions with the Regional Director and the "new" election regulations the Region was applying. Hearing I Tr. at 30-33, 69.

purported to direct a change of the "real facts" to "alternative facts." In short, he directed Region 6 to treat the petition as having been filed in Region 4 and then transferred to Region 6 (even though it had not been). The General Counsel's act was *ultra vires* – the General Counsel has no power under the Act, the Board's regulations, or any other authority to direct a treatment of proceedings in such a way as to change the "real facts." *See* 29 C.F.R. §§ 102.60 & 102.72.

The "real facts" demonstrate that the Petitioner violated Board regulations by filing the petition in the wrong Region. The General Counsel's action to try to fix the error by Petitioner was improper. The parties and the Board, including the General Counsel, are bound by "real facts" and the Act and its implementing regulations. The General Counsel's attempt to change "real facts," through legal directive was prejudicial, wrong, and denied due process to the Employer. And, as previously mentioned, any would-be Intervenors to an "R case" proceeding in the geographic Region of Region 4 were deprived of any public notice that would have accompanied a "real" filing in Region 4.

Here, the proper course for Region 6, in accordance with the Board's regulations, would have been for Region 6 to reject the petition and instruct the Petitioner to file a new petition in accordance with the Board regulations (namely, in the correct Region, Region 4). Instead, the General Counsel here erroneously engaged in "fiction writing" to try to fix the Petitioner's violation of the Board's regulations. On this error alone, Region 6's Decision should be vacated and the petition dismissed.

D. The Regional Director of Region 6 Erred in Not Recusing Herself and Not Ordering a Transfer of the Case to Another Region

The actions of Region 6 in accepting the petition in this case for a unit outside its geographic territory in violation of 29 C.F.R. 102.60 and while the petition and certification in Case No. 04-RC-159640 existed demonstrated exactly the type of bias and appearance of bias to eligible voters

and the public that the Employer had objected to in its Supplemental Objections in the initial case. The actions of Region 6 in allowing the petition to be withdrawn and the cancellation of the objections hearing that had been bifurcated and continued left the Supplemental Objections from Case No. 04-RC-159640 unresolved – namely, the issue of Regional Director Walsh's bias and perceptions thereof. Any objective observer viewing the "choreography" displayed by Region 6 in violation of clear and unambiguous Board regulations would have to conclude that Region 6 allowed the Petitioner to pick Region 6 as the venue for this case, with no involvement of the Employer in the choice. Then, having engaged in an improper acceptance and processing of the new petition, the Regional Director orchestrated a result which foreclosed any possible revelations emanating from a hearing on the prior objections pending against her fellow Regional Director. Such a one-sided display and failure to apply the Board regulations as written in order to advance the Petitioner's interests was improper, violated due process, and created on the part of the Employer, eligible voters, and the public, a reasonable perception that the Board is not neutral and impartial. In these circumstances, the Regional Director should have recused herself and ordered transfer of the case to another Region that was not involved in Case No. 04-RC-159640 in any way.[9]

E. The Processing of the Petition in This Case Violated Due Process

Due process requires fundamental fairness in legal and administrative proceedings. Here,

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[9] The mere appearance of impropriety in this case constituted a reasonable basis for the Employer to believe that the proceedings were not "fair." *See, Indianapolis Glove Co.,* 88 NLRB 986, 988 (1950) (vacating opinion where there was no proof of an ALJ's bias, but where ALJ conduct could create the appearance of impropriety, and holding that "we feel that it is essential not only to avoid actual partiality and prejudgment …in … Board proceedings, but also to avoid even the appearance of a partisan tribunal"); *see also, Standards of Ethical Conduct for Employees of the Executive Branch: General Principles,* 5 C.F.R. §2635.101(b)(14) (providing that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part).

the Employer was not accorded such due process. The Employer was required to comply with the Board's "new" regulations as written and Board decisions governing its conduct. The regulations themselves say that failure of the employer to comply with certain regulations is essentially automatic grounds for objection or waiver of arguments. Here, there is no question – none – that Region 6 accepted the petition filed in the wrong Region and then processed it in violation of Board regulation 29 C.F.R. §102.60. Likewise, there is no question that the petition was processed while the certification in Case No. 04-RC-159640 was still in place. But Region 6, with no explanation, ignored the Board's one-year certification bar rule. And then, as if solely to magnify the unfairness in the proceedings, the General Counsel -- **without motion of any party or according the Employer even any minimal hearing on the issue placed squarely in dispute by the Employer's Statement of Position filed the same day** -- issued an order, *sua sponte,* to "re-write" facts in attempt to validate retroactively actions of the Petitioner and Region 6 that plainly were in violation of Board regulations.[10] The General Counsel under the regulations has no power to "re-write" facts and fundamental fairness requires that all parties have the same regulations and 'real" facts applied to their cases. Indeed, facts are facts and are "stubborn things." The unit is solely in Allentown, Pennsylvania; that city is in Region 4; 29 C.F.R. §102.60 required the petition to be "filed" in Region 4 – no exceptions. In sum, the Board's processing of the petition here was wholly one-sided. It denied to the Employer the forum shopping allowed to the Petitioner.[11] For this reason, the Region's Decision should be vacated and the petition should be dismissed.

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[10] The Hearing Officer's refusal to allow the Employer to make a record on this issue is yet another example of the "new" election regulations being invalid as applied to violate due process.

[11] As noted *supra*, Region 6's processing of the petition also effectively "cut out" any would-be Intervenors. They had no public notice of a petition-filing for a unit in the territory of Region 4, and they were barred by the petition and Certification in Case No. 04-RC-159640 until at least October 28, 2016, when the Certification was revoked.

F. The Regional Director of Region 6 Erred in Ordering Posting of a Notice of Election Lacking Appropriate Lufkin language When the Taint of Objectionable Conduct Was Not Remedied and Was Magnified in this Case

In Case No. 04-RC-159640, the Employer raised the following election objections, among others:

> **Supplemental Objection 1:** The Regional Director's activities on behalf of the Peggy Browning Fund, including soliciting donations from unions and union-side law firms, as well as serving as the Fund's Chairman until August 19, 2015, violated the Standards of Ethical Conduct for Employees of the Executive Branch, as outlined in *Inspector General Report OIG-I-*516 (November 9, 2015); this conduct further created an appearance of impropriety and bias, and fundamentally undermined the neutrality of the Region in handling this case.
>
> **Supplemental Objection 2:** The conflict of interest created by the Regional Director's solicitation of donations on behalf of the Peggy Browning Fund from "prohibited sources," as defined in *Inspector General Report OIG-I-*516 (November 9, 2015), including the law firm representing the Petitioner in this case, was not disclosed; created an appearance of impropriety and bias; and resulted in the denial of due process to the Employer.

These objections were set for a hearing in that case, but they were neither fully addressed nor decided because the Regional Director for Region 6 cancelled the hearing in that case and permitted withdrawal of the representation petition itself. But the taint of the objectionable conduct creating the appearance of impropriety and bias and its effect on the minds of prospective voters in this case and the Employer remained when the Petitioner filed the new petition in this case. Region 6 did nothing to cure that taint. Instead, it directed an election in this case with a Notice of Election that called the election "essentially" a re-run election but failed to include language that would have satisfied the principles of the Board's decision in *Lufkin Rule Co.*, 147 NLRB 341 (1964). And it issued the direction of election after "legal gymnastics" to attempt to get around Petitioner's violation of 29 C.F.R. § 102.60, which any objective observer would view as creating a further impression of impropriety and bias on the part of the Board in favor of the Petitioner (i.e.,

it was clear that the Employer did not get to pick its Region of choice, which is what Petitioner has been allowed to do here).

Viewed another way, if the notice was for a "re-run election" then prospective voters should have been fully informed why there was a "re-run election" happening in accordance with *Lufkin.* But because they were not so informed and there is no such thing in Board classification as "essentially" a re-run election, prospective voters were left confused and with the taint of the appearance of impropriety and bias that the supplemental objections in Case No. 04-RC-159640 complained about. Moreover, the voluntariness of the showing of interest must be seriously questioned when the authorization cards signed by employees had to have been signed while the Objections to the first election were still pending, with the taint of the alleged Walsh misconduct uncured.[12] Thus, employees were required to vote in an election under the auspices of what appeared to be a biased and anti-employer Board with no curative Notice of Election (*i.e.*, one with sufficient *Lufkin* language).

By posting an Election Notice not in accordance with the principles of *Lufkin*, Region 6 compounded and extended the alleged bias of Director Walsh from the first election into the second. It was as if Region 6 was extending favorable treatment to both the Petitioner and Regional Director Walsh in that Regional Director Walsh's alleged misconduct and bias surrounding the first election were to have been excised from the new election ("essentially a re-run") without a

[12] To the extent that Regional Director Walsh's official involvement with the Peggy Browning Fund *could* be viewed narrowly as a discrete event occurring prior to the petition being filed in this case, this would not preclude it from being taken into account in this case. Rather, it is well-settled that pre-petition conduct may be considered where it is relevant because it "adds meaning and dimension to related post-petition conduct." *Dresser Industries*, 242 NLRB 74, 74 (1979). That is the case here because the withdrawal of the first petition and filing of a new petition were motivated by a desire by Petitioner and Region 6 not to have any hearing continue on the Supplemental Objections that were based on Regional Director Walsh's alleged misconduct.

hearing or even so much as an explanation.

G. The Board's Election Regulations Are Invalid Facially and as Applied Here

The Board's current regulations for representation elections are invalid facially and as applied here and violate the National Labor Relations Act, the Administrative Procedures Act ("APA"), and/or the U.S. Constitution in the following particulars:

1. The regulations deny employers a realistic opportunity to express free speech protected by the Act and the U.S. Constitution, thus also violating the APA.

2. The regulations compel speech by the employer in violation of the Act and the U.S. Constitution, thus also violating the APA.

3. The regulations deprive employees of a realistic opportunity to hear the message of speech from all sources, including other employees, third parties, the employer, and the petitioner, in violation of their right to hear from such sources as has been established as a right under the Act.

4. The regulations violate the Act and the U.S. Constitution by eliminating any realistic possibility of intervention by an intervening labor organization.[13]

5. The regulations exceed the Board's jurisdiction under Section 9 of the Act, and, thus violate the APA. The Board under Section 9 of the Act "shall provide an appropriate hearing upon due notice" for determining questions concerning representation. The regulations eliminate an "appropriate hearing upon due notice" because issues are precluded from being heard and the timeliness under the regulations is so short that fair presentation of evidence of all facts relevant to the Section 9 question concerning representation is impaired.[14]

6. The regulations violate the Act and the APA because they interfere with employees' ability to exercise their Section 7 rights under the Act freely in that they force employers to provide confidential employee information to petitioners without the consent of the employees – employees who might wish to refrain from some or all Section 7 activity, including hearing any, some or all communication from petitioning labor organizations.

7. The regulations violate the APA because they were adopted in an arbitrary and capricious manner, not as an objective interpretation Act, but instead, as a one-sided interpretation of the Act wholly inconsistent with the balance that was the intent of

[13] As applied here, the regulations effectively precluded any Intervenor from knowing of the petition.

[14] As applied here to preclude the Employer from a hearing on the petition processing and bias issues, the regulations are invalid.

the Act after the Taft-Hartley amendments. The public record associated with the Board's adoption of the regulations plainly demonstrates the one-sided interpretation of the Act, consistent only with pre-Taft-Hartley Act federal labor law, and application of that interpretation culminating in the current regulations.

8. The regulations violate the Act and the U.S. Constitution due process protections because they deprive employees of the right to vote for or against union representation while knowing the voting unit of employees who will be eligible for establishing a majority in a bargaining unit to be certified under the Act. Employees are entitled to know what voting group is voting and eligible and what the bargaining unit is that might or might not be established by the election. By establishing a procedure that permits voting in an election before the "descriptive boundaries" of the voting and bargaining unit are determined, the regulations impermissibly deprive or interfere with the ability of employees to vote meaningfully.

See Exhibit 5.

As applied here through the actions of Region 6 and the General Counsel certain of the regulations were simply ignored and Region 6 took actions that showed one-sided bias and prejudice and deprived the Employer of any opportunity to raise and make a record with respect to the processing issues. Moreover, as applied here, the regulations also deprived would-be Intervenors of their right to have reasonable notice of the petition that was filed outside the correct Region.

The Employer will fully brief these issues in accordance with the Board's regulations for briefs to be filed if review of this Request for Review is granted.

REQUEST FOR REVIEW – POST-ELECTION MATTERS

H. The Petitioner's Distribution of a Sample Ballot in the Critical Period of Case No. 04-RC-159640 Destroyed the Laboratory Conditions Surrounding the Second Election Because Region 6's Processing of the Two Cases Left the Taint of that Objectionable Conduct Unremedied

Petitioner's distribution of a copy of a facsimile sample ballot marked with an "X" in the "Yes" box reasonably would have given eligible voters the impression that the Board favored a "yes" vote. *See* Exhibit 2. The ballot did not include the disclaimer language required by the Board

on "Sample Ballots" since its decision in *Ryder Memorial Hospital*, 351 NLRB 214 (2007). The Employer objected to this conduct in Case No. 04-RC-159640. Region 6 failed to address and remedy the taint created by that conduct, which necessarily still existed when this case commenced. By failing to remedy that conduct to "clear the air" for the election in the new case, which Region 6 in its notice of election stated was essentially a "re-run" election, Region 6 thus left that taint intact in the critical period in this case – a taint which then destroyed the laboratory conditions necessary for a fair "re-run" election. The Employer renewed this Objection in this case, and, at a minimum, it should have been entitled to a hearing on the Objection. Alternatively, the Region 6 Decision should be vacated and the election results should be set aside.

I. Region 6 Demonstrated Bias in Failing To Remedy the Objections of the Employer to the Bias of Region 4 in Case No. 04-RC-159640 and Directing "Essentially" a "Re-run Election" Without Curing the Objectionable Taint Created by the Misconduct of the Regional Director of Region 4

The processing of this case by Region 6 demonstrates a concerted effort to bury the Objections to the conduct of the Regional Director for Region 4 in Case No. 04-RC-159640 and to expedite an election for the benefit of the Petitioner in this subsequent companion case. As should be evident from the prior discussion, bias prejudicial to the Employer is clearly apparent from the way the second petition was handled from the outset.

Region 6 permitted the Petitioner to commence this case in violation of Board regulations in the wrong Region of the Board. Petitioner had "forum shopped."[15] The petition should have been summarily rejected, but it was not.

Instead, Region 6 used the wrongly-filed petition in this case to avoid having to hear and decide the Objections in Case No. 04-RC-159640 and ordered withdrawal of that case petition belatedly after Petitioner had already filed this case. And Region 6 immediately rushed into

[15] Region 6 gave the Employer no similar opportunity to pick another Region.

"election mode" even though the certification in Case No. 04-RC-159640 was less than one year old and still barred any petition from Petitioner or other union Intervenor.[16]

The Employer promptly raised the violations of Board regulations and the bar existing petition and one-year certification bar. Because the conduct of Region 6 and its Regional Director were then in issue, the Employer moved to transfer the case but the motion was denied. Moreover, the General Counsel then for some reason took an interest in the case, and with no motion of either part or hearing, pronounced that the real facts of filing in the case would be ignored and instead the case would be treated as if it had been filed in the correct Region and then transferred. No statute or regulation gives the General Counsel, in these circumstances, the authority to effect a transfer absent motion and/or hearing by re-writing history.

In sum, the totality of the conduct of Region 6, aided by the improper *ultra vires* action of the General Counsel, demonstrates a bias in favor of the Petitioner that was prejudicial to the Employer. The proper course here would have been for Region 6 to require the Petitioner to file the petition in the correct Region of the Board -- Region 4 -- and then either party (or an Intervenor) could have moved for transfer to another Region in accordance with the Board regulations. That did not happen. Instead, the Petitioner was permitted to ignore the Board regulations and Region 6 pushed the case to what it termed "essentially a re-run election" without curing the taint that existed as a result of the conduct of the Petitioner and the Regional Director for Region 4 in the critical period of Case No. 04-RC-159640. In these circumstances, the Board should grant review, and on review vacate the Region 6 Decision and order dismissal of the currently pending petition.

[16] As previously noted, the processing of this case petition by Region 6 effectively deprived any Intervenor of notice of the petition and reasonable opportunity to intervene in this case.

J. The Petitioner's Offer to Turn the Authorization Cards Over to the Employer Chilled Employees in the Exercise of Their Section 7 Rights and Destroyed the Laboratory Conditions Surrounding the Second Election

On October 28, 2016, Region 6 held a representation election for this case – the second petition filed by the Petitioner for the Allentown bargaining unit. It is undisputed that Organizer Lopez brought 19 new authorization cards with him to the representation hearing for the second petition. *See* December 20, 2016 Hearing Transcript ("Hearing II Tr.") at 43. Based on Lopez's testimony, these cards were in addition to the ones submitted in support of the initial showing of interest for the prior election. *Id.* at 43, 45.

Immediately prior to the commencement of the hearing, Organizer Lopez held up the cards in one hand and asked if Employer's counsel wanted to see them. The Employer's counsel turned down the invitation.[17] Thereafter, the cards were left out in the open on Petitioner counsel's table for part of the time, before being placed underneath Union Attorney Larry Cary's notebook on the table. *Id.* at 35-36, 43-46, 49). Then, towards the end of the hearing this time it was Attorney Cary, legal counsel for the Petitioner, who offered to turn them over for inspection by the Employer, stating:

> If you want me [Attorney Cary] to put the cards into evidence so the Employer can inspect them, we'd be happy to do that…

Id. at 38 (Emphasis supplied) (quoting Hearing I Tr.at 70). This time, the offer was on the record and now cannot be easily denied by the Petitioner. Fortunately, the Hearing Officer rejected Mr. Cary's offer. But the damage had already been done.[18]

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[17] Organizer Lopez denied that this conversation occurred. However, his testimony shows him to have been an argumentative, reluctant witness with a very poor memory. His denial should not be credited especially when compared to that of Human Resources Director Mona Padilla. Ms. Padilla testified in a forth right and credible fashion that Organizer Lopez, did, in fact, offer the cards for review by the Employer's attorney. Hearing II Tr. 50-51.

[18] Had Attorney Cary thought it necessary to turn the cards over to the Region for some reason, he could easily have done so without emphasizing that the Petitioner was prepared to do so "so the

Uncontested evidence shows that there were four employees in the hearing room who were eligible to vote in the election. *Id.* at 48. Further, undisputed evidence establishes that Attorney Cary's offer was clearly heard by attendees sitting all the way to the back of the hearing room. *Id.* at 50. All of which fit precisely into the Petitioner's game plan – what better way to get the word out to employees, "If you signed an authorization card, you need to stand behind the Petitioner and do everything in your power to help it win the election." The implication of not doing so would not have been easily lost on those same employees – if the Petitioner lost the election, it would turn the cards over to the Employer. Despite such a readily discernable result, the Regional Director failed to find this conduct to have been objectionable. For the reasons set forth below, we contend that her ruling on this point ignored Board precedent and was based on findings of fact which were contrary to record evidence.

a. The Employer excepted to the finding that, "the cards were to be turned in to the Board as an addition to the original showing of interest"

The Petitioner's motivation in bringing the cards to the hearing is largely irrelevant to the current objections. It is well settled, however, that authorization cards and the adequacy of the Petitioner's showing of interest are not appropriate issues for a representation hearing. This fact was even noted by the Hearing Officer at the representation hearing:

> Then finally, you mentioned a showing of interest. Well, a showing of interest is not something that we litigate at pre-election hearing. And then the purpose of a showing of interest, if you're familiar, it is to see if we would have enough – if it's worth the Board's resources to conduct an election.
>
> So you need at least 30 percent showing of interest in order for the Board to, you know, make the signs saying notice of election, to have a Board Agent present, to make the ballots, to have the

Employer can inspect them." Hearing I Tr.at 70. That was the phrase which sent a message to all of those employees in attendance at the hearing. Apparently, the Petitioner had failed to turn over any cards to the Region in support of its showing of interest. That oversight was also a fatal defect in the processing of the new case.

> Employer or whoever it may be reserve a room and give the employees the opportunity to vote. That's the purpose of the showing of interest.
>
> So you know, I'm not going to go into whether or not it's tainted. I'm not going into whether or not – when it was collected, how it was collected, who collected it, what form it was collected on, all the other fun stuff and who was President and who was the Board member and who was the Regional Director of Region whoever number. It doesn't matter to me.

Hearing I Tr. at 21-22.

Clearly, the fact that the numerical adequacy of the showing of interest is not subject to review at a representation hearing is black letter law known to all labor law practitioners. The determination of the numerical sufficiency of the authorization cards submitted in support of a representation petition is an administrative function conducted by the Regional Office before the representation hearing is even held.[19]

So it is with a great deal of skepticism that one can try and discern how Hearing Officer Belinkoff could credit Petitioner Organizer Lopez's justification for bringing the signed cards with him to the hearing. *See* Hearing II Tr. at 45.[20] Organizer Lopez had tried to explain that the Petitioner intended to have the cards he had brought whit him added to the original showing of interest in Case 04-RC-159640.

b. The Employer contends that the characterization of the authorization cards being in the hearing room and in view of all present for "some relatively short period of time," was not supported by record evidence

It is undisputed that the authorization cards that Organizer Lopez brought with him to the

[19] What had been questioned was the continued taint from the prior case that of the showing of interest. In that respect, the Employer had raised an issue as to the adequacy of the showing of interest.

[20] Lopez testified in response to the question of who asked him to bring the cards to the hearing, "I was requested by Mr. Cary to bring in additional cards that were to be turned in after we had filed our petition because we collected more cards." Hearing II Tr. at 45.

hearing room were left out on Petitioner counsel's table in view of "all present at the hearing." (H.O. Report, at p. 2, par. 2.) The Employer excepted to the Hearing Officer's characterization, however, that they were left in the open for all attendees to see only for "some relatively short period of time." (H.O. Report, at p. 2, par. 2.) This improper characterization was never addressed by the Regional Director in her Decision and Certification of the Petitioner as the bargaining representative.

The fact is there was no evidence as to how long the cards were left out in the open. Human Resources Director Mona Padilla testified that she could see the cards from where she was seated towards the back of the hearing room. Hearing II Tr. at 49. Organizer Lopez confirmed that he did, in fact, bring signed authorization cards into the hearing room. And it was not a small number of authorization cards. When asked by Employer's counsel as to the number of cards involved, Organizer Lopez refused to answer. Only when directed to do so by the Hearing Officer, did Lopez admit as to the exact number of cards – 19 in all. *Id.* 45.[21]

Lopez's reluctance to testify, however, did not end with the number of cards left out on the table. When asked by Employer's counsel about the length of time the cards remained in the open and were visible to attendees, he was equally evasive. *Id.* at 43-44.

No further evidence was adduced on this issue other than that to which Mr. Lopez reluctantly testified. The hearing lasted for one hour and forty-five minutes. What is not clear is how long the cards were kept out in the open. They could have been in the open for 30 minutes, 60 minutes, or even more. It is undisputed that Ms. Padilla saw the pile of signed cards and realized

[21] According to Lopez, these cards were in addition to the initial number submitted in support of the first petition. Hearing II Tr. at 45. Lopez's explanation serves as a clear admission that the Petitioner had not even filed a new showing of interest in support of the petition in Case No. 06-RC-186558. This fatal omission would be ascertainable by a review of the Region's case file.

that they were authorization cards. Other attendees likely saw them as well. It is readily apparent, however, that there is no evidence supporting the Hearing Officer's attempt to minimize the effect of the Petitioner's actions by finding that the cards were left in the open only "for some relatively short period of time." (H.O. Report, at p. 2, par. 2.)

c. The Employer also excepted to the finding that, "the Employer failed to present evidence that the offer to show authorization cards was disseminated beyond the four eligible employees present in the hearing room or that the cards would be disseminated if the Petitioner lost the election." (H.O. Report at p. 5, par. 2.)

The Employer excepted to this finding by the Hearing Officer as it was not supported by the record evidence and ignores existing Board precedent. The Regional Director's reliance thereon was similarly defective and contrary to both the record evidence and common sense. As the Board has recognized in many decisions, any expression of company or union attitudes "even to small groups of individuals," is likely to be rapidly disseminated around a plant or other business during the struggle of organization. *Waltham Line & Cement Co.,* 170 NLRB 523 (1968). *See also Irving Air Chute Co., Inc. v. NLRB,* 350 F.2d 176 (2nd Cir. 1965) and cases cited therein.

The rapid spread of the Petitioner's threats in the instant case should also be readily presumed. Certainly, the subject matter was sufficiently high profile to have commanded the attention of anyone in the bargaining unit. Namely, that the Petitioner was offering to turn over to the Employer the identities of a large number of union supporters who had signed cards – 19, in fact. One can only imagine the conjecture, rumors and expression of outright fear that would have been engendered at the first revelation of such a threat. As discussed *supra,* the revelation of such information and breach of confidentiality surrounding the identity of card signers would run counter to one of the main precepts of Board practice. Because of the potentially severe impact on the expression of voter free choice, the breach of such confidentiality – unless compelled by the

Board's own processes – has long been considered a serious violation of Board policy and an objectionable act.

And here, in the instant case, there was not merely one potential source for revealing these threats to eligible voters in the bargaining unit, but at least four and potentially five employee witnesses to the Union's offers regarding the cards. Hearing II Tr. at 48.[22] Indeed, the record shows that there were four or five employees in the hearing room at the time that both sets of remarks were communicated. Undisputed record evidence further shows that each offer – that of Organizer Lopez and Petitioner's Attorney Cary – were loud enough to have been heard by everyone in attendance. *Id.* at 50.

Finally, the relative importance of the remarks – and the likelihood of their subsequent dissemination – was greatly increased by the source of the threats themselves. They were not made by third parties speaking only in terms of conjecture. No, the first offer to turn the cards over was made in the hearing room by the lead organizer for the Petitioner's campaign – Luis Lopez. The second was made by none other than the Petitioner's own legal counsel – Attorney Larry Cary. Not only were these individuals high-level agents of the Petitioner, but they each were in a position to turn the cards over and reveal the identities of the employee signatures at that very moment.

A case with somewhat analogous facts can be found at *Claxton Manufacturing Co.,* 258 NLRB 417 (1981). There, the union "read names of employees at union meetings in order to, among other things, identify pro-union and anti-union employees." 258 NLRB at 423. The Board found that such conduct helped create an atmosphere of fear and coercion and destroyed the laboratory conditions surrounding that election.

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[22] The number constituted almost 10% of the eligible voters in and of itself.

In the instant case as well, employees were concerned about having their individual sympathies and support revealed. The Hearing Officer completely ignored testimony from Organizer Lopez showing that the Petitioner was so concerned over employee complaints that they had been interrogated by the Employer over whether they had signed authorization cards, that he wrote a letter to management characterizing the tactic as an attempt to create widespread intimidation among eligible voters. Hearing II Tr. at 32. While this letter was sent by Organizer Lopez to Allentown management in 2015, it was part of the same on-going campaign by the Petitioner to organize the nursing home.[23] Incredibly, the Regional Director ignored both this argument and rejected the evidence upon which it was based.[24]

With the offers to turn the cards over to the Employer for inspection, the Petitioner had "closed the loop" so to speak, on what it had complained about in its letter from 2015. Through the Petitioner's own offers – for which there was no legal purpose – the Employer could have obtained the very same confidential information that the Petitioner had complained it had previously sought through illegal interrogation. Unfortunately, the chilling effect on voters would have been the same in either circumstance.

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[23] Employer's Hearing Exhibit No. 1 which was improperly rejected by the Hearing Officer Belinkoff and to which the Employer specifically excepts. *See* Exhibit 3. Although the letter addresses alleged Employer misconduct from the prior election campaign in 2015, the fact that it references concerns over the actions of still present management officials (Human Resources Director Manager Padilla, for example) and addresses the very same issue of breaching the confidentiality of the authorization cards, makes it very relevant to the on-going campaign at issue in the instant case. The Petitioner's letter, which states that employees were "intimidated" by alleged attempts by management to discern who had signed cards, should have been admitted as evidence which cast a light on conduct by the Petitioner's agents at the representation hearing for the second election. *See Buedel Food Products Co.,* 300 NLRB 638 (1990); *Stevenson Equipment Co.,* 174 NLRB 865 (1969).

[24] The Hearing Officer erroneously sustained an objection to Employer's Hearing Exhibit 1. *See* Exhibit 3 and Hearing II Tr. at 34. The exhibit was relevant to shed light on conduct occurring during the critical period, and thus it is admissible into evidence. *See Buedell Food Products Co.,* 300 NLRB 638, 638 n.2 (1990); *Stevenson Equipment Co.,* 174 NLRB 865, 867 n.1 (1969).

d. The Employer excepted to the finding that the "conduct at issue . . . was directed toward Counsel for the Employer, not employees." (H.O. Report at p. 5, par. 2.)

The Hearing Officer attempted to further minimize the impact of the Petitioner's actions by characterizing them as being directed at the Employer's counsel, instead of at employees. As shown below, this characterization is both disingenuous and not supported by record testimony. Despite clear and substantial evidence to the contrary, the Regional Director's Decision and Certification failed to address it in any manner.

The first incident in which the Petitioner offered to turn over the signed authorization cards in its possession occurred right before the start of the representation hearing. It was at that time that Organizer Lopez asked the Employer's counsel if he wanted to see the authorization cards that Lopez had in his possession. Organizer Lopez did so right in the middle of the hearing room and loud enough to be heard by Ms. Padilla and the four or five bargaining unit employees who were present and waiting for the hearing to begin. Human Resources Director Padilla specifically testified that at this time she had heard Organizer Lopez ask Employer's counsel if he wanted "to look at the cards." Hearing II Tr.at 50-51.

As a management labor attorney for almost 40 years, why would the Employer's counsel at the hearing have been be interested in looking at authorization cards, especially when the offer was not accompanied by a demand for recognition? Why ask the question so loudly that everyone in the room could hear? Why not step outside and ask the question in private? The answer to these questions is clear: the intended audience for these remarks was not Employer's counsel, but rather the bargaining unit employees in the hearing room.

This is also an issue that the Petitioner had raised previously with employees during the election campaign immediately prior to the second one. As noted previously, the Petitioner had

sent a letter to all eligible voters addressing employee concerns over questions surrounding the identity of those who had signed cards. Organizer Lopez testified that employees came to him at that time "to complain about management asking them about whether they had signed union authorization cards." *Id.* at 35. According to the letter sent to employees, the Petitioner characterized such conduct, if true, as an attempt to intimidate employees. *See* Exhibit 3 and Hearing II Tr. at 32-35. The Petitioner must have felt that finding out the identity of card signers had been one of the Employer's objectives and that, once obtained, such information would be detrimental to the perceived well-being of employees.

Fast forward one year later but during the same continuous organizing campaign in the very same bargaining unit and the issue of the identity of the card signers was once again present. Only this time, instead of the Employer allegedly seeking to ascertain the names of the signatories through illegal interrogation, that very same information was being offered over to the Employer by the Petitioner – in an open government hearing no less! By creating the possibility of Employer knowledge of individual union supporters – the Petitioner could hold itself out as the only source of protection for all of the employees who had signed cards. A source of protection, that is, so long as those same employees voted for the Petitioner and the Petitioner won the election. This was likely a very effective tactic – and just as illegal as if it had been the Employer seeking to obtain such information through interrogation. Indeed, the chilling effect of the Petitioner's offers to turn over the authorization cards would have been no different than the act of interrogation seeking the same information.

Just so there was no doubt about what the Petitioner was prepared to do with the signed cards, the Petitioner's own attorney offered to turn them over to the Employer – not the Employer's counsel – at the hearing itself and while the parties were on the record:

> If you want me [Attorney Cary] to put the cards into evidence so the Employer can inspect them, we'd be happy to do that . . . . (Emphasis supplied.)[25]

Hearing I Tr. at 70-71. Since this was part of the record and an official transcript was being compiled of the proceedings, there was no way for the Petitioner to credibly deny that the offer took place.

But while counsel for the Petitioner was speaking towards the Hearing Officer when he made the offer to turn the cards over to the Employer, his message was directed to those seated behind him – the four to five employees eligible to vote in the election. Two times, in the same hearing, these same employees witnessed the Petitioner's offer to turn their signed cards over to the Employer. The cards were right there in the open at counsel's table. And to exacerbate matters and reinforce the impropriety of the offers to begin with, those same employees heard the Hearing Officer state that it would be inappropriate to turn the cards over, "We were not litigating showing of interest, no." Hearing I Tr. at 71.

One cannot reasonably imagine that the Petitioner's intended message failed to make a strong and lasting impression on the employees who were in attendance at the hearing – and to those who were likely informed thereof at a later point in time. One way or another, the Petitioner would make sure that the Employer would know who had signed cards.

e. Finally, the Regional Director's Decision and Certification fails to address the threatening nature of the Petitioner's offer to disclosed the cards and ignores decades of Board law designed to protect signatures from the effects of any such disclosure

It is a well-known bed-rock principle of the Board that in the usual course of representation proceedings the identity of those who have signed authorization cards is not to be revealed as a

[25] Putting the cards into evidence would also make a permanent record of the identities of the card signers which would then be available to the Employer and third parties.

result of those legal processes. *See, e.g., The Midvale Company*, 114 NLRB 372 (1955). This principle and the over-riding importance of the confidentiality of the authorization cards were summarized by the Board in *National Telephone Directory Corp.*, 319 NLRB 420 (1995):

> The confidentiality interests of employees have long been an overriding concern to the Board. Generally, an employer who seeks to obtain the identities of employees who signed authorization cards and attend union meetings violates the Act. Indeed, an employer may not surveil its employees to obtain such information, and may not give its employees the impression that is has surveilled – or will surveil – them to obtain such information. Eddyleon Chocolate Co., 301 NLRB 887 (1991); Beretta U.S.A. Corp., 298 NLRB 232 (1991), *enfd. mem.* 943 F.2d 49 (4th Cir. 1991); Adco Metals, 281 NLRB 1300 (1986). Further an employer violates the Act if it questions its employees about this information. Hanover Concrete Co., 241 NLRB 936 (1979); Dependable Lists, *Inc.*, 239 NLRB 1304 (1979); *Campbell Soup Co.*, 225 NLRB 222 (1976).
>
> Additionally, the Board has always held authorization cards in confidence during representation cases. Midvale Co., 114 NLRB 372, 374 (1955). Consistent with this rule, the courts have held that an employer is not entitled to obtain the disclosure of union authorization cards under the Freedom of Information Act. 5 U.S.C. § 552. See Committee on Masonic Homes v. NLRB, 556 F.2d 214 (3rd Cir. 1977); Madeird Nursing Center v. NLRB, 615 F.2d 728 (6th Cir. 1980); Pacific Molasses v. NLRB, 577 F.2d 1172 (5th Cir. 1978); NLRB v. Biophysics Systems, *Inc.*, 91 LRRM 3079 (S.D.N.Y. 1976). These cases recognize the importance of an employee's ability to sign an authorization cards with confidence that the cards will not be presented to the employer, because "it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed." Committee on Masonic Homes, *supra*, 556 F.2d at 221.

319 NLRB at 421.

As noted above, the primary basis for this long-standing policy is the universal recognition that employees are "especially likely to be inhibited for fear of the employer's or – in some cases – the petitioner's capacity for reprisal and harassment." *Smithfield Packing*, 334 NLRB 34 (2001). It was this fear of reprisal to which the Petitioner likely sought to subject eligible voters at Allentown by making its offers to turn the cards over to the Employer and reveal the identity of

each of the signatories.

In numerous cases, the Board and the courts have gone to great length to emphasize the seriousness of a threat to expose employee signatories of authorization cards. The serious implications of such exposure were aptly described by the Fifth Circuit in *Pacific Molasses Co. v. NLRB,* 577 F.2d 1172 (5th Cir. 1978):

> When an employee signs an authorization card during the initial phase of union organization, he expresses a personal decision to seek the support of a union in future dealings with his employer. Since the union organization of a company may take the form of protracted and bitter struggle over employee loyalties, an employee may be amply justified in wishing to protect his pro-union declaration from employer scrutiny.
>
> We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information. The inevitable result of the availability of this information would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the N.L.R.A., and, for all intents and purposes, would make meaningless those provisions . . . .

Pacific Molasses, *supra* at 1182.

A somewhat analogous fact situation was presented in *Beretta USA Corp.*, 298 NLRB 232, *enf'd*, 943 F.2d 49 (4th Cir. 1991). There, a manager's description of what would happen with employee authorization cards at a representation hearing was found to be illegal because employees were told that the cards would be turned over to the employer:

> Respondent's witness . . . testified that at a metrology lab meeting in January 1988 [management] stated: "If anybody signed the card, it would get back to the labor relations board and the labor relations board would have to give the name and numbers to the personnel office so the company would know, they would know."
>
> With regard to the merits, we find that such a statement as here made by a management representative to rank-and-file employees would have a tendency to restrain or coerce them in the exercise of the Section 7 right to sign union authorization cards. We note in this connection that the statement is exceedingly broad, containing no

> limitations or qualifications on disclosure, that it was made in the context of contemporaneous unfair labor practices, and that there was no justification for making it. We find that employees reasonably assume from the statement in question that the Respondent would inevitably learn of their card-signing activities. Accordingly, we conclude that this statement created an impression of surveillance and constituted a violation of Section 8(a)(1). S.E. Nichols, *Inc.*, 284 NLRB 556, 577 (1987).

A similar finding should have been reached in the instant case. Certainly, the Petitioner's offers to turn the cards over to the Employer were objectionable. The Hearing Officer's characterization of the threat to turn over the cards as being *de minimis* clearly runs counter to the great weight of authority. Further, the fact that the second offer to turn the cards over to the Employer was made on the record and by the Petitioner's own legal counsel does not lessen its impact or imbue it with any special protections. To the contrary, the Employer contends that it made the threat that much more viable and serious.

In light of the highly seriousness nature of the Petitioner's conduct, the Employer contends that more evidence of dissemination was unnecessary. Certainly, the four to five bargaining unit employees in the court room heard the threat. That number amounts to nearly 10% of the employees eligible to have voted in the election. And the threat itself could be readily analogized to an employer threatening to close the plant should the union win the election. Dissemination of such a notorious and chilling remark can be assumed, as it can in this case.[26]

As the Board held in *Beretta USA*, there was no justification for employees being told that their identities as card-signers would be turned over by the "labor relations board" to the employer in that case. The only difference with our case is that here, the offer to turn over the cards came

[26] Each of the 19 signatories of the authorization cards would have been clearly affected, as would have the four employees in the hearing room. That number of employees -- 23 in all – would have been sufficient to have affected the results of the election.

directly from the Petitioner whose agents had retained possession thereof and who had brought the cards to the hearing ostensibly for that very purpose. The actions of the Petitioner, through its agents, could not have been more invidious.

IV. CONCLUSION

For the reasons above, the Employer respectfully requests that the Board grant this request for review and vacate the underlying Decisions in this case. The petition should be dismissed.

Respectfully submitted this 6th day of March, 2017.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANOR CARE OF ALLENTOWN PA, LLC d/b/a
MANORCARE HEALTH SERVICES - ALLENTOWN,

Employer,

Case 06-RC-186558

and

RETAIL, WHOLESALE AND DEPARTMENT STORE
UNION, RWDSU, UNITED FOOD AND COMMERCIAL
WORKERS, AFL-CIO,

Petitioner.

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

MANORCARE OF ALLENTOWN PA, LLC,

Employer,

and **Case 06-RC-186558**

RWDSU-UNITED FOOD AND COMMERCIAL WORKERS UNION,

Petitioner.

EMPLOYER'S ELECTION OBJECTIONS

NOW COMES the Employer, ManorCare of Allentown PA, LLC, by and through its counsel of record, and files the following objections to the conduct of the election and conduct affecting the results of the election held on Tuesday, November 29, 2016:

Objection No. 1

During the critical period before the Board election in October 2015 in Case 04-RC-159640, agents, employees and representatives of the Petitioner restrained and coerced employees and interfered with employee free choice in a manner which destroyed the laboratory conditions necessary for a fair and free election. This result was caused by the distribution of copies of a "Sample Ballot" marked with a "YES" box checked and **not** including the disclaimer language required by the Board on its "Sample Ballots" since its decision in *Ryder Memorial Hospital*, 351 NLRB 214 (2007). The Board thereafter permitted the current case to commence and at all times failed to cure the remaining taint created by Petitioner's improper use of the Sample Ballot in the first campaign. The impact of the Sample Ballot was also not addressed by the Notice of Election in the instant case which failed to incorporate the necessary *Lufkin*

EXHIBIT 1

language. The *Lufkin* language needed to be provided to inform the employees that the election was being re-run because in the first election critical period the Petitioner had engaged in conduct that would reasonably have led employees to believe that the Board favored a "yes" vote and was not a neutral government agency. Because such *Lufkin* language was not included in the Notice of Election in the current case, but which expressly stated that the upcoming election was "essentially a re-run election," the suggestion of bias created by the Sample Ballot was present during the critical period following the filing and processing of the instant Petition.

Objection No. 2

The Petition in this case was filed by Petitioner and accepted by Region 6 while another Petition and case involving this same Employer and bargaining unit was still pending (Case 04-RC-159640). The filing in Region 6 instead of Region 4 also violated Board regulations. Moreover, the Board violated Board decisional law (namely, "pending certification and petition bars" to a new petition for the same unit) and created potential confusion in the minds of employees by accepting the Petition and processing it while the other case was still pending with unresolved objections. In fact, the certification of Petitioner as representative of the bargaining unit had already been issued and was pending at the time the instant Petition was filed.

Objection No. 3

The actions of Region 6 and Board General Counsel, ex post facto, to accept the invalid Petition (filed and accepted in violation of Board regulations), and to treat the Petition retroactively as having been originally filed in Region 4 and transferred to Region 6, when that was contrary to fact, violated the Board's regulations and thus the Act. Moreover, the Board's failure to require compliance with and follow its own regulations for the processing of representation cases, at a minimum, raised questions concerning the Region's and Board's

neutrality in this case, if it does not in fact demonstrate bias in favor of the Petitioner and against the Employer. These actions created an environment in which a fair and free election was impossible.

Objection No. 4

The Regional Director's refusal to recuse herself and Region 6 from the processing of this case by refusing to transfer the case out of Region 6 created an appearance of bias that destroyed the laboratory conditions surrounding the election which were necessary for a fair and free vote.

Objection No. 5

Due to the overlap in cases and improprieties in the processing of the instant Petition in violation of Board regulations, the Board bias against the Employer (bias of Region 4) raised in the predecessor Petition that was never addressed, together with new evidence in this case of bias and actions by Region 6 and the Board in favor of the Petitioner and in violation of Board regulations, have served to destroy the laboratory conditions for the election in this case. The Objections raising bias issues in the predecessor case were as follows:

> a. **Supplemental Objection 1:** The Regional Director's activities on behalf of the Peggy Browning Fund, including soliciting donations from unions and union-side law firms, as well as serving as the Fund's Chairman until August 19, 2015, violated the Standards of Ethical Conduct for Employees of the Executive Branch, as outlined in Inspector General Report OIG-I-516 (November 9, 2015); this conduct further created an appearance of impropriety and bias, and fundamentally undermined the neutrality of the Region in handling this case.
>
> b. **Supplemental Objection 2:** The conflict of interest created by the Regional Director's solicitation of donations on behalf of the Peggy Browning Fund from "prohibited sources," as defined in Inspector General Report OIG-I-516 (November 9, 2015), including the law firm representing the Petitioner in this

case, was not disclosed; created an appearance of impropriety and bias; and resulted in the denial of due process to the Employer.

Objection No. 6

The Notice of Election in this case erroneously referred to the election as "essentially [being] a re-run of the election conducted on October 1, 2015 in Case No. 04-RC-159640." The remaining language of the Notice of Election did not fulfill the required *Lufkin* requirements and misrepresented the nature and content of the Employer's election objections in the prior case. A full and proper *Lufkin* notice would have been required in a "true" re-run election. However, the NLRA and Board regulations do not authorize anything akin to "essentially a re-run election." An election in these circumstances, had to be either be a new "election" or a "re-run election." By creating a new type of "hybrid" election without a *Lufkin* notice – "essentially a re-run election" – the Regional Director improperly permitted the taint of prior objectionable conduct to remain without curing the taint as would have been required under a "true" re-run election conducted under Board law and regulations. Consequently, the legal deficiencies in the Notice of Election created the likelihood of reasonable confusion in the minds of voters in this election.

Objection No. 7

The Petitioner's election observer engaged in improper electioneering in the polling place during the morning voting period.

Objection No. 8

During the critical period, the Petitioner offered financial, pecuniary inducement to at least one employee-eligible voter to support the Petitioner's organizing effort. Other eligible voters were made aware of the offer during the critical period and prior to voting in the election.

Objection No. 9

The Petitioner, through statements of its agents, threatened eligible voters and made employees reasonably fearful of implicit retaliation by offering to turn over authorization cards that they had signed to the Employer if the Petitioner did not win the election.

Objection No. 10

Any other conduct upon which evidence is submitted by the Employer or which is discovered during the course of the Region's investigation of these objections which served to undermine the laboratory conditions surrounding the election.

Except where otherwise noted, all of the actions complained of in the aforementioned election objections occurred during the critical period preceding and/or during the election on November 29, 2016 and destroyed the laboratory conditions necessary for a fair and free election.

Based on the foregoing Election Objections and Offer of Proof submitted separately in support thereof, the Employer respectfully requests that the election results not be certified and that a hearing be scheduled for the presentation of evidence in support of each of the Employer's objections.

Submitted this 6th day of December, 2016.

Clifford H. Nelson, Jr.
Counsel for the Employer
ManorCare of Allentown PA, LLC

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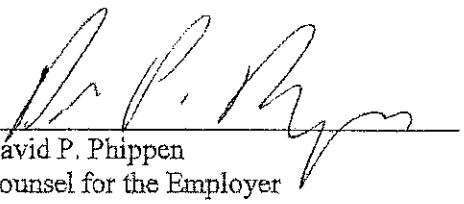

David P. Phippen
Counsel for the Employer
ManorCare of Allentown PA, LLC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANOR CARE OF ALLENTOWN PA, LLC d/b/a
MANORCARE HEALTH SERVICES - ALLENTOWN,

Employer,

Case 06-RC-186558

and

RETAIL, WHOLESALE AND DEPARTMENT STORE
UNION, RWDSU, UNITED FOOD AND COMMERCIAL
WORKERS, AFL-CIO,

Petitioner.

EXHIBIT 2

ManorCare sample Ballot final.doc Open

ELECTION DAY! ELECTION DAY! ELECTION DAY!

YOUR TIME HAS COME
VOTE "YES" FOR THE RWDSU-UFCW
AND BRIGHTEN YOUR FUTURE

EMPLOYEES **HCR ManorCare Health Service-Allentown**

INCLUDED: All full and regular part-time certified nursing aides, employed by the Employer at the facility located at 1265 Cedar Crest Blvd. Allentown, Pa.

EXCLUDED: All other employees, guards and supervisors as defined in the Act.

DATE
Thursday, October 1, 2015
TIMES
6:00 A.M to 8:00 A.M and 2:00 P.M to 4:00 P.M
PLACE
In the First Floor Employee Break Room

PREPARED BY THE HCR MANOR CARE HEALTH SERVICES-ALLENTOWN RWDSU ORGANIZING COMMITTEE

SAMPLE BALLOT

DO YOU WISH TO BE REPRESENTED FOR PURPOSES OF COLLECTIVE BARGAINING BY THE RWDSU?

[X]	[ ]
YES	**NO**

The union election process is by SECRET BALLOT and is overseen by a representative from the National Labor Relations Board. Management will NOT know how you voted unless you tell them!!!

1 of 2 items

EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANOR CARE OF ALLENTOWN PA, LLC d/b/a
MANORCARE HEALTH SERVICES - ALLENTOWN,

Employer,

Case 06-RC-186558

and

RETAIL, WHOLESALE AND DEPARTMENT STORE
UNION, RWDSU, UNITED FOOD AND COMMERCIAL
WORKERS, AFL-CIO,

Petitioner.

EXHIBIT 3

Rejected

Case No. 06-RC-159640 Official Exhibit No. Emp. 1
Identified
Received
IN THE MATTER OF: Manor Care
Date: Witness: Reporter:
No. Pages: 2

Mrs. Kate Huok - Administrator
HCR Manor Care Health Services-Allentown
1265 S Cedar Crest Blvd.
Allentown, Pa. 18103
(610)776-7522 Tel
(610)776-0270 fax

September 22, 2015

Dear Mrs. Huok,

I am writing to you to formally object to you and your entire management teams actions and behaviors in the past weeks. I am disturbed by the recent intimidation, threats and questioning employees whether they signed union authorization cards by Kim Houser, Lashanda Riddick, Lauren Thompson, Mona Padilla and you.

I received numerous calls about Lashanda Riddicks behavior Friday September 18th 2015 in the afternoon on the first floor. Lashonda "stated to a couple of Union supporters that they all need to be fired". I am especially disturbed about your statement to Ruth Santamaria, "Manor Care does not have to negotiate with the Union". Ruth Santamaria happens to be a member of the ever growing RWDSU-UFCW Manor Care Health Services-Allentown union organizing committee. Our RWDSU-UFCW committee includes the following Manor Care Allentown employees Melissa Esch, Holly Fredrick, Karisma Lopez, Nervali Villanuevo, Terell Lloyd, Rosemary Leveille, Marie Noisette and Dolores Diaz.

As you are aware by now, the Retail Wholesale and Department Store Union has a full organizing campaign at your HCR Manor Care Health Services-Allentown facility in Allentown, Pennsylvania. We have stipulated to an election agreement with case number 04-RC-159640 at the NLRB in Philadelphia. The election is scheduled for October 1, 2015. We are in daily communication with approximately 80% of your Manor Care Health Services-Allentown employees who have expressed their concerns to us. These concerns are backed up in statements by numerous Manor Care employees throughout your facility.

E-1

EXHIBIT 3

We will not tolerate these actions and behaviors by you and your Manor Care management team. Our RWDSU-UFCW Manor Care organizing committee members and all other union supporters activities are protected by the National Labor Relations Act. All of our Union supporters are entitled to speak with their fellow employees about forming a Union in the workplace, provided that it is not on company paid time and provided it does not interfere with the company's operations.

The Union therefore insists that you, your company managers and supervisors cease and desist from illegally interfering with, harassing the RWDSU-UFCW Union's organizing committee and all of their fellow Manor Care Allentown employee's rights to form a Union in the work place if they so choose. We will not allow you or any member of your management team to unfairly and unjustly discipline, harass, intimidate and threaten to terminate any of our union supporters because they are forming a union.

The Union fully intends to stand behind all of the employees at your HCR Manor Care Health Services-Allentown facility in defense of their rights under the law to form a Union. Our Union intends to file unfair labor practice charges and bring legal action against you and management team for the above listed (NLRB) Act violations and will continue to protect and defend all of the employees at Manor Care from any further violations as well if these violations of the law continue. Please feel free to call me at 516-554-5400 if you have any questions or concerns.

Sincerely,
Luis Lopez
Organizer
RWDSU-UFCW

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANOR CARE OF ALLENTOWN PA, LLC d/b/a
MANORCARE HEALTH SERVICES - ALLENTOWN,

Employer,

Case 06-RC-186558

and

RETAIL, WHOLESALE AND DEPARTMENT STORE
UNION, RWDSU, UNITED FOOD AND COMMERCIAL
WORKERS, AFL-CIO,

Petitioner.

EXHIBIT 4

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

November 9, 2015

To: Board

From: David Berry
Inspector General

Subject: Report of Investigation – OIG-I-516

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving Dennis Walsh (subject), Director, Region 4. The case was initiated after the OIG received information alleging that the subject's activity with the Peggy Browning Fund violated certain laws and/or created a conflict of interest with the subject's case handling duties. Our investigative efforts substantiated that the subject violated various regulatory provisions of the Standards of Ethical Conduct for Employees of the Executive Branch.

Because the Board appoints Regional Directors to his or her position, this report, with the attached investigative exhibits (IE), is issued to the Board for its review and consideration of appropriate administrative action.

FACTS

1. The subject was appointed to the position of Region 4 Director in March 2013. Prior to that appointment, the subject was the General Counsel at the Federal Labor Relations Authority, an NLRB Board Member, a Chief Counsel to former Board Member Peggy Browning, and held various other attorney positions at the NLRB. (IE 1 Pages 8-9)

2. Peggy Browning died during her term as a Board Member. (IE 1 Page 10)

3. To honor the memory of Member Browning, a group of individuals, including the subject, created a nonprofit organization identified as the Peggy Browning Fund to raise funds to sponsor law students in fellowships related to labor law practice and to conduct labor law seminars that expose law students to the labor law practice. (IE 1 Page 10)

4. The Peggy Browning Fund raises funds in a variety of ways that include conducting networking functions that are also known as "award ceremonies," soliciting donations for membership in the "Leadership Circle," publishing newsletters with an envelope for donations, and maintaining a Web site with links for donations. (IE 1 Exhibits 4, 7, & 17 & IE 2 Pages 6-7)

5. The Peggy Browning Fund conducts four to five networking functions each year in various cities including, Philadelphia, New York, Washington, Chicago, and Los Angeles. (IE 2 Page 7)

6. Each networking function has a specific fundraising goal. (IE 1 Pages 38-39 & IE 3)

7. The award recipients at the networking events generally include a union official, an attorney, and a neutral or arbitrator; however, Government officials have also been selected. (IE 2 Page 20)

8. Award recipients are chosen, in part, for his or her ability to raise funds for the Peggy Browning Fund, and award recipients are asked to raise a specific amount of money for the Peggy Browning Fund. (IE 1 Pages 38- 41, IE 2 Page 12)

9. Government officials and some of the arbitrators are not asked to raise the funds. (IE 2 Pages 12-13)

10. Each networking event has a Host Committee that is responsible for selecting the honoree; setting the dates and making arraignments for the event; and some members of the committee also participate in fundraising for the event. (IE 2 Pages 8-9)

11. Each Member of the Peggy Browning Fund Board of Directors is also a member of the Host Committee. (IE 1 Pages 41 & IE 2 Pages 11)

12. The Host Committee also includes Peggy Browning Fund Advisory Board members who are in the area that the networking event will be held; lawyers and other individuals who deal with labor or employment law issues; other individuals who are strong supporters of the Peggy Browning Fund; and individuals who are selected based on his or her ability to raise funds on behalf of the honoree. (IE 2 Page 11)

13. The Host Committee members receive invitations to the networking event to use to invite people who they think will buy tickets or make a contribution. (IE 2 Page 10 & IE 3)

14. The Peggy Browning Fund also sends invitations to individuals who attended prior networking events. (IE 2 Pages 10-11 & IE 3)

15. The Peggy Browning Fund generally receives contributions from individuals who have some affiliation with either the fund or the honoree and identify with what the fund does. (IE 2 Pages 13-14)

16. Approximately 5 to 6 years ago, the Peggy Browning Fund Board went through a self-examination process: (IE 2 Pages 15-16)

a. Up to that time, the fund was principally run by Joe Lurie, Peggy Browning's widower; the subject, and an executive director;

b. At that time, the fund had grown and there was a concern that Mr. Lurie would be spending less time on the fund's activity;

c. In that light, the fund's Board of Directors wanted to make changes to ensure that the fund would be self-sustaining;

d. During this process, the Board of Directors hired a Development Director to be in charge of its fundraising activity; and

e. The Development Director recommended to the Board of Directors that they put the names of the Host Committee members on the invitations so that people would know who was involved and the fund would look like a worthwhile organization.

17. As stated by the Development Committee Chairman, his general understanding is that: (IE 2 Page 16)

> I think it's just to let people know in more detail who's involved in the Peggy Browning Fund because I think that people on the Host Committee, you know, you read who's on the Host Committee and you say, oh, I know that person. If that person is involved in the Peggy Browning Fund, it's a worthwhile organization.

18. After being appointed as the Region 4 Director, the subject submitted a financial disclosure form that listed his activity with the Peggy Browning Fund. (IE 4)

19. The Deputy Designated Agency Ethics Officer (DAEO) reviewed the subject's financial disclosure form and suggested to the subject that he seek permission for his activity with the Peggy Browning Fund, as it was considered outside employment. (IE 4)

20. On July 9, 2013, the subject submitted a request for outside employment to the Associate General Counsel, Division of Operations-Management, stating, in part, that: (IE 4)

> I have been involved in the Fund since its inception, and have been a Member of its Board since that time. Since January 2011 I have been Chairman of the Board. I have no direct involvement in fundraising; i.e., I do not directly ask anyone for contributions, and I do not allow my name to be used on any literature that directly solicits contributions. My role is to run our quarterly meetings, keep track of committee assignments, and responsibilities, and I am Chair of the Committee that organizes the annual Law Students Conference. I also participate in the networking and fundraising events in various cities by introducing the guests who introduce the honorees, and by presenting the Peggy Browning Fund award to each honoree.

21. On July 11, 2013, the Associate General Counsel, Division of Operations-Management, approved the subject's request stating, in part, that: (IE 4)

> I am approving it consistent with the information in your letter that you do not engage in fund raising activities nor do you allow your name to be used on any literature that directly solicits contributions. Should this situation change, please inform me. In addition, work for the Peggy Browning Fund should not be conducted on government time or using government resources or equipment, except to the extent that the work can be considered outreach for the NLRB.

22. When approving the request, the Associate General Counsel relied upon the facts provided to her in the subject's request. (IE 4 Transcript Page 11-13)

23. A review of the subject's Government email account disclosed that he had approximately 1,000 email messages regarding his activity at the Peggy Browning Fund that were sent or received via the Agency's email system. (IE 5)

24. Included in the email messages were messages from the Peggy Browning Fund detailing and updating the donations from individuals for the networking functions; draft and edited minutes of Board of Directors' meetings; and other activity relating to the fundraising activity, general business of the fund, and labor law seminars. (IE 5 & 6)

25. A comparison of the time and dates of the email messages and the subject's time and attendance records disclosed that the subject received and sent messages related to the Peggy Browning Fund during normal working hours. (IE 5)

26. A review of the content of the email messages and a comparison to the subject's time and attendance records disclosed that the subject conducted Board of Directors' meetings and other meetings while on official time. (IE 5 & 7)

27. The subject generally acknowledged that he used his Government email account and official time for activities related to the Peggy Browning Fund, but he asserted that some of the activity was related to approved outreach activities, and some of the meetings occurred during his lunch breaks. (IE I Pages 27-34)

28. The subject also acknowledged that he participated in telephonic meetings for the Peggy Browning Fund on the Government telephone in his office. (IE 1 Page 34)

29. When asked about his duties as the Board of Directors' Chairman, the subject stated that the description in the document provided by the Peggy Browning Fund was accurate with the exception that he was not directly involved in fundraising. (IE 1 Page 15)

30. When asked to explain what he meant by "directly involved in fundraising," the subject stated: (IE 1 Page 15-16)

> My definition of it was always using my name to directly ask someone for money, that's my definition of it, or doing it myself on the phone or in writing. That was the way I interpreted it, based on the guidance that I had gotten from both ethics people here at the Board and the FLRA.

31. The subject acknowledged that, on occasion, he talked to the Board of Directors about fundraising strategy, but that he did not engage in it himself. (IE 1 Page 17)

32. When asked to describe the Peggy Browning Fund supporters, the subject described the donors as international unions, vendors and companies that support unions, individuals who are interested in workers' rights, and attorneys on both the management and labor side. (IE 1 Page 12)

33. When asked to explain handwritten notes on a printed email message, the subject recalled that the notes were regarding a telephone call with the AFL-CIO General Counsel following up with her to check on whether she spoke to other international union general counsels about renewing Leadership Circle contributions. (IE 1 Page 17-20; See also IE 1 Exhibit 3)

34. Email messages in the subject's Government email account do not support the subject's assertion that he was not involved in fundraising or that he "scrupulously kept myself away from direct fundraising because of my affiliation with the Board." [In this context "Board" refers to the NLRB.] (IE Page 12 & IE 8)

35. Prior to networking events, the subject received the invitation for the event that had printed on it his name as a member of the Host Committee. (IE 3)

36. The invitations for each of the networking events were identical in format and included a request for a monetary donation and specific levels for giving. (IE 3)

37. When asked about the role of the Host Committee, the subject acknowledged that the goal of the Host Committee was to reach a certain level of funding; however, he stated that he only agreed to have his name listed as a Host Committee member, and he was not involved in any fundraising aspect of the committee. (IE 1 Page 43)

38. The subject acknowledged that he received updates on the progress of the Host Committee's efforts to collect contributions and that the updates included the names of the individuals who made contributions. (IE 1 Pages 44-47)

39. The subject acknowledged that he knew his name was on the invitations for each of the networking events and that the purpose of the invitation was to invite people to the event and to make a contribution. (IE 1 Page 47)

40. The subject acknowledged that he knew that the Host Committee members would send the invitations to their contacts. (IE 1 Page 48)

41. The subject acknowledged that he knew that the Host Committee used monetary sponsorship levels that correspond to advertisements and acknowledgments in the networking event's program book. (IE 1 Pages 49-51)

42. The subject agreed that a significant number of the advertisements in the program books are from unions, the internationals and locals, law firms that have some association with unions, and entities that provide services to unions. (IE 1 Page 51; See also IE I Exhibit 15)

43. The subject acknowledged that most of the entities,law firms that represent unions and the local and international unions, are prohibited sources. (IE 1 Page 51)

44. A review of the content of the email messages in the subject's Government email account documented the subject's receipt of regular and reoccurring updates on the status of the fundraising receipts for each networking conference that included the name of the donor, the date and amount of the contribution, and, for some contributions, the individual who secured the contribution. (IE 6)

45. A review of the lists of individuals and entities that made contributions to the Peggy Browning Fund networking conferences disclosed that numerous labor organizations made monetary donations to the Peggy Browning Fund. (IE 9)

46. A comparison of the individuals and entities listed as making monetary contributions in support of the Philadelphia networking event to a list of cases pending in Region 4 between March 2013 and September 2015, found that of the 2,628 charges pending during that time, 1,519 (57.8 percent) involved at least one prohibited source who made a contribution to the Peggy Browning Fund. (IE 9)

47. The Web site for the Peggy Browning Fund listed the subject by his name and title as the Region 4 Director, National Labor Relations Board directly across from an Internet link to make a donation to the Peggy Browning Fund. (IE 1 Exhibit 4)

48. The subject acknowledged that he was aware that the Peggy Browning Fund's Web site had "ways" to make donations. (IE 1 Page 21)

49. The Spring 2015 Peggy Browning Fund newsletter contained a column signed by the subject that had the following as the last paragraph: (IE 1 Exhibit 7 & IE 10)

> Our award receptions in Los Angeles, Philadelphia and New York were a resounding success and contributed greatly to our ability to continue these programs that have made such a lasting contribution to the workers' rights movement. It is the students who are embarking on the adventure of these fellowships today who need your help to continue this great work. Thank you for all you do for the Peggy Browning Fund.

50. The Spring 2015 newsletter also included an envelope for the purpose of sending the Peggy Browning Fund a contribution and listed the subject as the Board of Directors Chair by name and "NLRB Region 4." (IE 1 Exhibit 7)

51. When asked about the newsletter, the subject stated that it was his understanding that the past contributors received the newsletter, but he was not certain of that fact; he did not intend the

paragraph in the Spring 2015 newsletter as a request for contributions; and he was aware that the newsletters contained the envelope for contributions. (IE 1 Pages 34-37)

52. When asked if part of the equation for selecting an awardee was who would draw the contributions to help support the Peggy Browning Fund, the subject responded: (IE 1 Page 38)

> I expect it was, but I don't know that for sure, but I expect that that would be it, yes.

53. The subject acknowledged that he sent the following email message from his Government computer: (IE 1 Pages 39-39; IE 1 Exhibit 8)

From: Walsh, Dennis
To: Martz@afscme.org; rbrean@usw.org; Rnikolas@calibrecpa.com; wbliebman@[redacted].com; wbliebman@[redacted].com; Joseph Lurie; lthineha@aflcio.org; pat.szymanski@changetowin.org; GwynneW@1199.org
Cc: Rhonda G. Kelley; Joseph Lurie; Mary Anne Moffa
Subject: RE: DC Event
Date: Thursday, April 25, 2013 2:57:00 PM

PBF Board Members:

I'm reaching out to you so soon after our Board meeting yesterday because the third awardee for our DC Awards Reception has declined. Letter Carriers President Frederic Rolando would be very happy to be recognized and may do so for next year, but he declined for this year. That leaves us light on those awardees who would actively raise funds for our programs. We have an assigned goal of $100,000 for the DC event. Bricklayers President James Boland has agreed to raise between $40-$50,000. We still need another person to help Nancy Schiffer raise the remaining $50,000.

Please review your contacts and suggest either another labor leader or union attorney who could be asked right away to finalize this process! Thank you very much.

Dennis Walsh

54. The Peggy Browning Fund Web site contained images of the subject wearing a name badge that identified him the Region 4 Director, NLRB, a member of the Host Committee, and the Chairman of the Peggy Browning Fund Board of Directors. (IE 11)

55. The subject acknowledged that at the networking functions he wore a badge that identified him as the Region 4 Director and that he introduced individuals as part of the award ceremony. (IE 1 Page 56)

56. The subject could not recall discussing his activities with the Peggy Browning Fund with Margery Lieber, the prior NLRB DAEO who also happened to be the wife of the Peggy Browning Fund's Development Committee Chair.

57. The Deputy General Counsel provided the following information regarding the corrective action taken by the NLRB: (IE 12)

a. The subject's permission to engage in outside employment as the Chairman of the Peggy Browning Fund Board of Directors was revoked;

b. The subject was asked to resign his position as the Chairman of the Peggy Browning Fund and requested that the Peggy Browning Fund stop using his name and NLRB position to endorse its activities;

c. The Acting DAEO worked with the Division of Operations-Management to address conflicts issues with the cases involving the individual who reported the allegations that resulted in the OIG investigation, and the Acting DAEO continues to work with the Division of Operations-Management to address other recusal issues that have arisen;

d. The Acting DAEO contacted the Peggy Browning Fund to address issues related to the activities of NLRB employees and the Peggy Browning Fund activities;

e. The Acting DAEO spoke to NLRB employees about speaking at Peggy Browning Fund events and is in the process of preparing material to be issued to NLRB employees on that issue; and

f. Since late 2014, the NLRB Ethics Office has taken a more active and comprehensive approach when advising employees about service on non-profit boards.

ANALYSIS

The following analysis is provided to assist you in understanding the basis for the investigation. The Board should consult with the Agency's Division of Legal Counsel and the Office of Human Resources to determine what, if any, administrative action should be taken as a result of an OIG investigation.

Overview

Reasonable cause exists to find that the subject violated the Standards of Ethical Conduct for Employees of the Executive Branch (*Standards*) by personally soliciting funds from prohibited sources, using his official position to engage in fundraising, allowing his NLRB employment to be used to endorse the activities of the Peggy Browning Fund; and by using official time and Government resources for activities related to his outside employment with the Peggy Browning Fund. Additionally, given that the subject knowingly allowed his name to be used to solicit contributions from prohibited sources who were involved in cases pending in Region 4, and the number of charges that involved prohibited sources, we find that the subject engaged in a course of action that created the perception that his official actions could be influenced in exchange for support of the Peggy Browning Fund.

Specific Violations

The *Standards* state that a Federal employee may engage in fundraising in his personal capacity provided that he does not "personally solicit funds or other support . . . from any person . . . known to the employee . . . to be a prohibited source . . .." 5 C.F.R. 2635.808(c)(1)(i). A "prohibited source" is any person who: is seeking official action by the NLRB; conducts activities regulated by the NLRB; or has an interest that may be substantially affected by the performance or nonperformance of the subject's official duties. See, 5 C.F.R. 2635.203(d)(1). An organization that

is made up of members that are prohibited sources is also a prohibited source. Id. For the purposes of the *Standards*, a "person" includes both individuals and entities. See, 5 C.F.R. 2635.102(k). It is well-settled that the private sector unions and employers, and their representatives, are prohibited sources for the purposes of the application of the *Standards* to the activities of NLRB employees.

Despite the subject's assertion that he did not engage in direct fundraising, he did in fact personally solicit funds from unions regulated by the NLRB and their representatives. "Personally solicit" includes not only asking directly for a donation through person-to-person contact, it also includes using one's name or identity in correspondence that requests or otherwise encourages donations or by permitting others to do the same. 5 C.F.R. 2635808(a)(4). The subject permitted the Peggy Browning Fund and its Host Committees to use his name on invitations for the networking functions. The Board of Directors, of which the subject is the Chairman, was advised to include their names on the invitations by the Peggy Browning Fund Development Director and thereafter implemented the recommendation. In fact, according to the subject, the only thing he agreed to do with regard to the Host Committee duties was allow the use of his name on the invitations. The subject knew that the invitations were used to solicit donations, and that the solicitations were targeted at prohibited sources. A conclusion otherwise is simply not supported by the facts. Prior to each networking event, the subject received copies of the invitations. After the solicitations by the Host Committee began, the subject then received regular and reoccurring updates at his Government email account documenting that prohibited sources, including local unions that had charges pending in or otherwise disposed by Region 4, had in fact made donations to the Peggy Browning Fund and the amount of the donations. Additionally, networking event program booklets mostly consisted of advertisements procured by donations from prohibited sources. Finally, when asked about the individuals and entities that supported the Peggy Browning Fund, the subject listed categories that are clearly prohibited sources.

We also find that the exception regarding solicitations made through the media, oral remarks, or mass produced correspondence is not applicable to the Peggy Browning Fund's method of solicitations for the networking functions. See, 5 C.F.R. 2635.808(a)(4). That exception does not apply if the employee knows that the solicitation is targeted towards prohibited sources. Id. As detailed in the facts above, the Peggy Browning Fund specifically targeted the unions and their representatives. No reasonable argument can be made that supports a finding that it was just coincidental that prohibited sources were solicited and that 57.8 percent of the charges involved a prohibited source. See, OGE 93x8. The simple fact, as explained by the Development Committee Chairman, is that the Peggy Browning Fund is supported by groups of individuals and entities with a homogeneous interest in labor relations. That group is made up of entities that are regulated by the NLRB and individuals that have an interest that can be affected by the subject's performance of his official duties.

The Standards also prohibit an employee from using, or permitting the use, of his or her "official title, position or any authority associated with his public office to further the fundraising effort . . .." 5 C.F.R. 2635.808(c)(2). The subject permitted his name, Region 4, and National Labor Relations Board to be used in newsletters that solicited donations. He also permitted his name and his position as the NLRB Region 4 Director to be used on the Peggy Browning Fund Web site that solicited donations. He voluntarily attended the networking session wearing a name badge that tied his official position to the Peggy Browning Fund position. Those acts clearly violated the prohibition stated in the *Standards*.

The *Standards* also required the subject use his official time in an "honest effort" to perform official duties. See, 5 C.F.R. 2635.705(a). The subject was not authorized to use official time to conduct the business of the Peggy Browning Fund. In fact, the subject was instructed in writing not to use official time for his outside employment activity related to the Peggy Browning Fund. Despite that directive, he did.

As the Regional Director, the subject was the senior Agency official in the Regional Office and was, for all purposes, its leader. Unless in an approved absence status, the subject was obligated to be at work attending to the business of the Region by leading the Region's enforcement of the National Labor Relations Act. Absenting himself for Peggy Browning Fund Board Meetings or participating in its conference calls rendered the subject unavailable to the Regional staff for that time. Time spent reading and replying to Peggy Browning Fund email messages was time not spent on the activities related to managing the Regional Office and enforcing the National Labor Relations Act. That the subject may have worked outside of normal working hours to make up lost time is not a mitigating factor. A Regional Director simply does not "punch a clock." In fact, the subject, as a member of the Senior Executive Service, is not permitted to earn credit hours. See, 5 C.F.R. 610.408. For a Regional Director, the "honest effort" means being there when he or she is needed, not when it is convenient given the Director's other priorities in life.

We do not concur that the subject's activity related to the Peggy Browning Fund's law conferences were appropriate "outreach" activities. Outreach is intended to be appearing on behalf of the NLRB at functions to promote the activities of the NLRB. Our review of the subject's email messages found that his law conference activity far exceeded what was appropriate NLRB outreach activity. Nevertheless, the subject's misuse of time and resources for the law conferences is far eclipsed by the misconduct related to his case handling duties, and we determined that our investigative report should not be delayed while we attempt to quantify the lost time.

The *Standards* also state that an employee shall not use Government property for other than an authorized purpose. 5 C.F.R. 2635.704. The term "Government property" includes telecommunications equipment and services. Id. The subject was directed not to use the Agency's email system in support of the Peggy Browning Fund. Notwithstanding that specific direction, the subject violated the NLRB's written policy of acceptable use of its information technology resources. That policy states, in part, that it is unacceptable to use the email system for activity related to outside employment. See, National Labor Relations Board Administrative Policies and Procedures Manual, Chapter IT-6, *Acceptable Use of Agency Information Technology Resources*.

The *Standards* provide that, as a general principle, "[p]ublic service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain" and "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards . . .." 5 C.F.R. 2535.101(b)(1) and (14). The subject was the Chairman of the Peggy Browning Fund, an entity that can only act through its officers and directors. The subject allowed his name and his employment at the NLRB to become integral component of the Peggy Browning Fund's image, and he did so for the purpose of enhancing the ability of the fund to solicit donations from entities and individuals associated with organized labor. The subject appeared at networking events with a name badge that directly linked his position as the Board of Directors' Chairman to his position as the NLRB's Region 4 Director. The subject's name and employment at the NLRB were used on the Peggy Browning

Fund's appeals for donation on its Web site and in its newsletters. Any one of these facts is bad, but taken together they created the perception that the subject's official actions could be influenced in exchange for support of the Peggy Browning Fund. The local union officials and their representatives make a donation, get drinks and dinner, and hang out with the decision-maker for their NLRB cases. Under these circumstances, why wouldn't a rank and file unit member who filed a duty of fair representation charge or a charged employer perceive that the union officials had some special access to the NLRB process? It is a perfectly reasonable and logical assumption. Unfortunately, it is a perception that could taint over half of the charges in Region 4 and the work of its staff.

The subject is not entitled to safe harbor as provided by 5 C.F.R. 2635.107. The subject failed to disclose all relevant information when seeking permission to engage in outside employment related to his position as the Chairman of the Peggy Browning Fund Board of Directors. The duties he described in the request were not as extensive as the duties outlined in the Peggy Browning Fund position description nor did he accurately describe what he actually did. Additionally, at the time of his request, the subject knew that his name was in fact used by the Peggy Browning Fund on the invitations for the networking events.

It is true that the NLRB ethics program officials could have been more attentive to their duties and that this situation may have been avoided if the ethics officials had taken a proactive role in advising the subject. Nevertheless, it is the subject who had the duty to ensure that his conduct conformed to the *Standards*, and he alone bears the responsibility for his misconduct. Although the NLRB has taken some action to remediate the situation, and will apparently continue to examine what could be done better, for purposes of addressing the subject's misconduct, shifting the focus from the subject to the ethics program is inappropriate. See, OGE 06x4.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANOR CARE OF ALLENTOWN PA, LLC d/b/a
MANORCARE HEALTH SERVICES - ALLENTOWN,

Employer,

Case 06-RC-186558

and

RETAIL, WHOLESALE AND DEPARTMENT STORE
UNION, RWDSU, UNITED FOOD AND COMMERCIAL
WORKERS, AFL-CIO,

Petitioner.

EXHIBIT 5

ATTACHMENT A

MANORCARE OF ALLENTOWN PA, LLA D/B/A MANORCARE HEALTH SERVICES-ALLENTOWN

CASE 06-RC-186558

ISSUES FOR HEARING OCTOBER 28, 2016

EMPLOYER POSITIONS:

I. POSITIONS ON ISSUES EMINATING FROM REPRESENTATION CASE

A. On October 21, 2016, Regional Director Wilson issued an Order approving Petitioner's request to withdraw the petition in Case No. 04-RC-159640. No prior notice had been given to the Employer regarding that request. Such action was in contravention of the Board's own Case Handling Manual which states that, "A request to withdraw the petition, submitted while objections are pending, should normally not be approved." NLRB Case Handling Manual, Part II, Sec. 11116.3. Objections were pending in that case – serious objections involving the appearance of bias by Regional Director Walsh from Region 4 and the payment of donations to the Peggy Browning Fund chaired by Regional Director Walsh, Petitioner's own legal counsel. The fallout and taint from the conduct alleged as inappropriate in those objections follows the instant petition which is one reason that withdrawal should never have been granted. Indeed, Petitioner's legal counsel remains the same.

As referenced, in brief, above, the Employer contends that good cause did not exist for withdrawal to have been permitted and requests a full hearing on that issue and dismissal of the instant petition pending the holding of same. That hearing should be held before any new petitions are processed and afford the Employer, should it be necessary, the right to file a Request for Review to the Board.

B. The petition was improperly filed with Region 6 by the Petitioner. Such action demonstrates extreme forum shopping and is impermissible. The site of the employees in question is in Allentown, Lehigh County, Pennsylvania, which is in Region 4. See NLRB Rules and Regulations, Sec. 102.60; NLRB Case Handling Manual, Part II, Sec. 11002.3 & 15010. The proper office for a petition is Region 4 and then the Board should consider transfer of the case to another region under its transfer procedures because of the conflict of interest present in Region 4. See NLRB Rules and Regulations, Sec. 102.60 & 102.72; NLRB Case Handling Manual, Part II, Sec. 11712 & 11714.

C. The petition was improperly filed because there was another petition still pending in Case No. 04-RC-159640. The petition was filed on October 20, 2016. The petition and question concerning representation in that case, Case 04-RC-159640, was pending until withdrawal was approved on October 21, 2016. Such action demonstrates improper case processing by the Region 6 and cannot simply be overlooked because of the one day difference in dates.

EXHIBIT 5

D. On November 3, 2015, Regional Director Walsh certified the RWDSU as the representative in the bargaining unit currently being treated as having a new question concerning representation. The certification, even if one contends that it was issued improperly as does the Employer, cannot simply be ignored and treated as if it never existed. Once again, the Region is not applying proper procedures in the handling of this new petition. The original petition in Case No. 04-RC-159640 and the certification related thereto cannot simply be ignored as a result of a secret withdrawal and ill-conceived attempt to avoid the ramifications of having the truth revealed regarding the allegations surrounding the Employer's election objections. Due process required that the objections hearing should have gone on as scheduled and served to remove the taint that had infected the ability of employees in this unit to vote in a fair and free election. Now that result has been foreclosed with respect to any election emanating from the improper processing of this new petition.

E. The showing of interest was tainted by the Region's failure to address, in any fashion, the election objections in Case No. 04-RC-159640. The taint remains due to a failure of the Board to require a notice posting that informs the employees of the objectionable conduct by the Petitioner in that case and in this case, contrary to the principles of the Board decision in Lufkin Rule Co., 147 NLRB 341 (1964). Of critical import is the fact that those objections were still pending when the showing of interest in support of the instant petition was obtained.

F. The failure to "cure" the allegations of election objection number 1 from Case No. 04-RC-159640, has arguably continued to foster the impression in the minds of eligible voters that the NLRB favors the Petitioner in this election as well as in the first election. This impression was also arguably in the minds of unit employees and potential voters as they signed authorization cards supporting the filing of the instant petition – a result of the fact that the instant petition was filed before the prior petition had even been withdrawn.

G. The actions of NLRB Regional Director Dennis Walsh, while Chair of the Peggy Browning Fund, and thereafter, absent notice posting in accordance with the principles of Lufkin Rule Co., 147 NLRB 341 (1964), serves to improperly create the appearance of bias in favor of the Petitioner by the entire NLRB, including Regions 4 and 6. These actions are outlined in the report of the Inspector General (OIG-1-516, November 9, 2015) which is attached as Exhibit 1.[1]

H. In Case No. 04-RC-159640, involving this same unit of employees, the Employer raised the following election objections, among others:

> **Supplemental Objection 1:** The Regional Director's activities on behalf of the Peggy Browning Fund, including soliciting donations from unions and union-side law firms, as well as serving as the Fund's Chairman until August 19, 2015, violated the Standards of Ethical Conduct for Employees of the Executive Branch, as outlined in Inspector General Report OIG-I-516 (November 9, 2015); this conduct further created an appearance of impropriety and bias, and

[1] Based on the nature of these allegations, and others set forth in this position statement, we will be filing a request to transfer this case shortly.

fundamentally undermined the neutrality of the Region in handling this case.

Supplemental Objection 2: The conflict of interest created by the Regional Director's solicitation of donations on behalf of the Peggy Browning Fund from "prohibited sources," as defined in Inspector General Report OIG-I-516 (November 9, 2015), including the law firm representing the Petitioner in this case, was not disclosed; created an appearance of impropriety and bias; and resulted in the denial of due process to the Employer.

Since these objections were set for a hearing, but neither fully addressed nor decided, the allegations and effect on the minds of voters and the Employer with respect to that election as well as this one, bars any proper processing of the instant petition. The taint of the objectionable conduct remains due to the failure of the Board to order posting of a notice in accordance with the principles of the Board's decision in Lufkin Rule Co., 147 NLRB 341 (1964). That action has led to a violation of the Section 7 rights of unit employees who may be proceeding to an election under the threat of what appears to be a biased and anti-employer Agency. Indeed, the voluntariness of the showing of interest must be seriously questioned when the authorization cards signed by employees had to have been signed while the objections to the first election were still pending.

II. THE UNFAIR LABOR PRACTICE CHARGE SHOULD BLOCK THIS PROCEEDING

An unfair labor practice charge is being filed contemporaneously with this Statement of Position. The Employer contends that this charge should be treated as a "blocking charge."

III. THE BOARD'S NEW ELECTION REGULATIONS ARE INVALID

The Board's current regulations for representation elections are invalid and violate the National Labor Relations Act, the Administrative Procedures Act ("APA"), and/or the U.S. Constitution in the following particulars:

1. The regulations deny employers a realistic opportunity to express free speech protected by the Act and the U.S. Constitution, thus also violating the APA.

2. The regulations compel speech by the employer in violation of the Act and the U.S. Constitution, thus also violating the APA.

3. The regulations deprive employees of a realistic opportunity to hear the message of speech from all sources, including other employees, third parties, the employer, and the petitioner, in violation of their right to hear from such sources as has been established as a right under the Act.

4. The regulations violate the Act and the U.S. Constitution by eliminating any realistic possibility of intervention by an intervening labor organization.

5. The regulations exceed the Board's jurisdiction under Section 9 of the Act, and, thus violate the APA. The Board under Section 9 of the Act "shall provide an appropriate hearing upon due notice" for determining questions concerning representation. The regulations eliminate an "appropriate hearing upon due notice" because issues are precluded from being heard and the timeliness under the regulations is so short that fair presentation of evidence of all facts relevant to the Section 9 question concerning representation is impaired.

6. The regulations violate the Act and the APA because they interfere with employees' ability to exercise their Section 7 rights under the Act freely in that they force employers to provide confidential employee information to petitioners without the consent of the employees – employees who might wish to refrain from some or all Section 7 activity, including hearing any, some or all communication from petitioning labor organizations.

7. The regulations violate the APA because they were adopted in an arbitrary and capricious manner, not as an objective interpretation Act, but instead, as a one-sided interpretation of the Act wholly inconsistent with the balance that was the intent of the Act after the Taft-Hartley amendments. The public record associated with the Board's adoption of the regulations plainly demonstrates the one-sided interpretation of the Act, consistent only with pre-Taft-Hartley Act federal labor law, and application of that interpretation culminating in the current regulations.

8. The regulations violate the Act and the U.S. Constitution due process protections because they deprive employees of the right to vote for or against union representation while knowing the voting unit of employees that will be eligible for establishing a majority in a bargaining unit to be certified under the Act. Employees are entitled to know what voting group is voting and eligible and what the bargaining unit is that might or might not be established by the election. By establishing a procedure that permits voting in an election before the "descriptive boundaries" of the voting and bargaining unit are determined, the regulations impermissibly deprive or interfere with the ability of employees to vote meaningfully.

* * * * *

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANOR CARE OF ALLENTOWN PA, LLC d/b/a MANORCARE HEALTH SERVICES - ALLENTOWN,

Employer,

Case 06-RC-186558

and

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, RWDSU, UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO,

Petitioner.

CERTIFICATE OF SERVICE

I certify I have electronically filed the foregoing Employer's Request for Review with the National Labor Relations Board's e-filing service. I have also e-mailed a copy to:

Hon. Nancy Wilson
Regional Director
National Labor Relations Board, Region 6
Nancy.Wilson@nlrb.gov

Larry Cary, Esq.
Cary Kane
lcary@carykane.com

This 6th day of March, 2017.

David P. Phippen

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